



THE
INDIAN LAW REPORTS

ALLAHABAD SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD
AND BY THE JUDICIAL COMMITTEE OF THE PRIVY
COUNCIL ON APPEAL FROM THAT COURT.

REPORTED BY

Privy Council	...	C. BOULNOIS, <i>Middle Temple</i> .
High Court, Allahabad	...	{ A. STRACHEY, <i>Inner Temple</i> ,
		{ W. K. PORTER, <i>Gray's Inn (Offg.)</i> .

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„ W. TYRRELL.

„ SYED MAHMOOD (*On leave from 29th November 1892.*)

„ G. E. KNOX.

„ H. F. BLAIR (*From 1st April 1892.*)

„ W. R. BURKITT (*Offg. from 10th November 1892.*)

„ R. S. AIKMAN (*Offg. from 29th November 1892.*)

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

PRIVY COUNCIL.

	Page.		Page.
Amarnath Sah v. Achan Kuar ...	420	Lachmi Prasad v. Narendro Kishore	
Chandi Din v. Naraini Kuar ...	366	Singh ...	169

FULL BENCH.

Agha Ali Khan v. Altaf Hasan		Lekhraj Singh v. Rai Singh ...	381
Khan ...	429	Muhammad Naim-ul-lah Khan v.	
Ali Abbas v. Kalka Prasad ...	405	Ihsan-ul-lah Khan ...	226
Ashfaq Ahmad v. Wazir Ali ...	1	Pem Singh v. Partab Singh ...	179
Beni Prasad v. Hardai Bibi ...	67	Ram Kali v. Kedar Nath ...	156
Bindeshri Naik v. Ganga Saran		Seth Chitor Mal v. Shib Lal ...	273
Sahu ...	154	Udit Singh v. Kashi Ram ...	185
Deoki Nandan Rai v. Tapesri Lal ...	201		

APPELLATE CIVIL.

Ali Ahmad v. Rahmat-ul-lah ...	195	Kishan Sahai v. Aladad Khan ...	64
Bandhu Bhagat v. Shah Muhammad		Lal Bahadur Singh v. Sispal Singh	498
Taqi ...	350	Madho Das v. Ram Kishen ...	238
Bechan Rai v. Nand Kishore Rai...	341	Mahabir Prasad v. Parma ...	417
Bisheshar v. Muirhead ...	362	Marism Bibi v. Sakina ...	8
Chain Sukh Ram v. Parbate ...	53	Mohan Lal v. Bilaso ...	512
Deoki Prasad v. Inait-ul-lah ...	375	Muhammad Husain v. Dip Chand ...	190
Duli Singh v. Sundar Singh ...	377	Muhammad Zahur v. Cheda Lal ...	141
Fatima Bibi v. Abdul Majid ...	531	Musaheb Zaman Khan v. Inayat-ul-	
Gauri Shantkar v. Babbal Lal ...	347	lah ...	513
Gaya Prasad v. Rajnath ...	176	Niaz Begam v. Abdul Karim Khan	600
Har Gobind v. Noni Babu ...	356	Pohkar Singh v. Gopal Singh ...	361
Har Narain Pande v. Ram Prasad		Radha Prasad Singh v. Mathura	
Misr ...	333	Chaube ...	50
Imam-ud-din v. Liladhar ...	524	Ram Manohar Misr v. Lal Behari	
Jafar Husain v. Mashuq Ali ...	193	Misr ...	343
Jai Kishn v. Bholanath ...	529	Ram Sukh Das v. Tota Ram ...	339
Jhinka v. Baljeo Sahai ...	509	Sabri v. Ganeshi ...	23
Jwala Dei v. Pirbhu ...	35	Sant Lal v. Sri Kishen ...	221
Kadir Bakhsh v. Bhawani Prasad	145	Sri Kishen v. Ishri ...	223
Kashi Ram v. Mani Ram ...	210	The Collector of Etawah v. Beti	
Kharag Prasad Bhagat v. Durdhari		Maharani ...	162
Rai ...	348		

TABLE OF CASES REPORTED.

APPELLATE CRIMINAL.

	<i>Page.</i>		<i>Page.</i>
Queen-Empress <i>v.</i> Hargobind Singh	242	Queen-Empress <i>v.</i> Mulua	... 502
_____ <i>v.</i> Hughes	... 25	_____ <i>v.</i> Niddan	.. 38
_____ <i>v.</i> Makhdum	... 354		

EXTRAORDINARY CRIMINAL.

Queen-Empress <i>v.</i> Hayfield	... 212	Queen-Empress <i>v.</i> Stanton	... 521
----------------------------------	---------	---------------------------------	---------

REVISIONAL CIVIL.

Cheda Lal <i>v.</i> Mulchand	... 30	Mihr Ali Shah <i>v.</i> Muhammad Husen	413
Gauri Datt <i>v.</i> Shankar Lal	... 358	Rahima <i>v.</i> Nepal Rai	... 520

REVISIONAL CRIMINAL.

Abdul Aziz. In the matter of the petition of—	... 49	Queen-Empress <i>v.</i> Bashir Khan	... 346
Daulat Singh. In the matter of the petition of—	... 45	_____ <i>v.</i> Sudra	... 336

TABLE OF CASES CITED.

A

	Page.
Alibas Ali v. Maya Ram, I. L. R., 12 All., 229 ...	460
Abdulla v. Mohan Gir, I. L. R., 11 All., 490 ...	233
Abdul Rakman v. Pehari Puri, I. L. R., 10 All., 194 ...	358, 359
Achut Ram Chandra Pai v. Hari Kamti, I. L. R., 11 Bom., 313 ...	327
Adi Deo Narain Singh v. Dukharan Singh, I. L. R., 5 All., 532 ...	158
Ajoodhia Pershad v. Musammatt Dewana, Panjab Record, 1870, No. 18, p. 56 ...	94, 137
Ahmad-ud-din Khan v. Majl's Rai, I. L. R., 5 All., 438 ...	381, 394, 400
Ajaib Nath v. Mathura Prasad, I. L. R., 11 All., 164 ...	405, 412
Asghar Ali v. Delroos Banoo Begum, I. L. R., 3 Calc., 324 ...	9, 12
Ashik Ali v. Mathura Kandu, I. L. R., 5 All., 187 ...	403
Ashootosh Chuckerbutty v. Baneemadhab Mookerjee, Revenue, Civil and Criminal Reporter, Vol. I, p. 26 ...	381, 404
Ashraf-un-nissa Begam v. Umrao Begam, I. L. R., 1 All., 572 ...	381
Aumirto Lal Bose v. Rajoneckant Mitter, L. R., 2 I. A., 113 ...	158

B

Badal Singh v. Birch, I. L. R., 15 Calc., 762 ...	358, 359
Bajinath Sahai v. Moheep Narain Singh, I. L. R., 16 Calc., 535 ...	201, 206, 207
Bajaji Krishna v. Pirchand Budharan, I. L. R., 13 Bom., 221 ...	499
Banda Hasan v. Abadi Begam, I. L. R., 4 All., 180 ...	301
Bandhu v. Shah Muhammad Taki, Weekly Notes, 1888, 119 ...	520
Bandhu Bhagat v. Shah Muhammad Taqi, Weekly Notes, 1892, p. 40 ...	529, 539
Banno Bibi v. Mehdi Husain, I. L. R., 11 All., 375 ...	230, 237
Batak Nath v. Pitambar Das, I. L. R., 13 All., 360 ...	514, 515
Behari Lal v. Habba Bibi, I. L. R., 8 All., 627 ...	9, 12
Beni Madho v. Basdeo Patak, I. L. R., 12 All., 9 ...	179, 181, 183, 191
Benod Behary Mookopadhaya v. Beer Narain Roy, Revenue, Civil and Criminal Reporter, Vol. I, p. 46 ...	361
Bhagwan Sahai v. Bhagwan Din, L. R., 17 I. A., 98 s. c., I. L. R., 12 All., 387 ...	196, 197, 198
Bhajan v. Mushtak Ahmad, I. L. R., 5 All., 324 ...	197, 198
Bhawani Paksh v. Ram Das, I. L. R., 13 All., 216 ...	179, 182, 183
Bhikhan Khan v. Ratan Kuar, I. L. R., 1 All., 512 ...	400
Bhup Singh v. Gulab Bai, Weekly Notes, 1885, p. 269 ...	326, 330
Bibi Ladli Begam v. Bibi Raja Rabia, I. L. R., 13 Bom., 650 ...	415
Bibee Schodwa, 12 B. L. R., 82 ...	385
Bindeshri Naik v. Ganga Saran Sahu, I. L. R., 14 All., 154 ...	58
Buddree Das v. Durga Pershad, N.-W. P., H. C. Rep., 1870, p. 234 ...	405, 408
Buhal Singh Chowdhry v. Behari Lal, 1 B. L. R., A. c., 206 ...	417, 419

C

Chinna Gaundan v. Kumara Gaundan, 1 Mad., H. C. Rep., 54 ...	94, 98
Cursandas Govindji v. Vudravandas, Purshotam, I. L. R., 14 Bom., 482 ...	157

TABLE OF CASES CITED.

	Page.
D	
Deekishen v. Bansi, I. L. R., 8 All., 172	340
Dbunno Kazi, I. L. R., 8 Calc., 121	521, 523
Digambur Misser v. Ram Lal Roy, I. L. R. 14 Calc., 761	408
Doss Money Dossee v. Jonmenjoy Mullick, I. L. R., 3 Calc., 363	302
Drobo Moyee Dabee v. Bipin Mundul, 10 W. R., c. R. 6	415
Dular Chand v. Balram Das, I. L. R., 1 All., 453	524, 527
Durga Dai v. Bhagwant Prasad, I. L. R., 13 All., 356	514, 519
Durga Persad v. Kesho Persad Singh, I. L. R., 8 Calc., 626	499

E	
Empress v. Chait Ram, I. L. R., 6 All., 103	355
— v. Ganga Din, Weekly Notes, 1887, p. 139	355, 356
— v. Gaspar, D'Silva, I. L. R., 5 Bom., 479	555
— v. Gauri Shankar, I. L. R., 6 All., 42	355
— v. Grish Chander Talukdar, I. L. R., 5 Calc., 614	521, 522
— v. Ishan Dutt, 15 W. R., Cr., R. 34	521, 522
Empress of India v. Kaliprosunno Doss, I. L. R., 14 Calc., 245	213, 215, 216, 521, 522
— v. Kashmiri Lal, I. L. R., 1 All., 625	355
Eranjoli Illath Vishnu Nambudri v. Eranjoli Illath Krishnan Nambudri, I. L. R., 7 Mad., 3	57

F	
Falcke v. Scottish Imperial Insurance Company, L. R., 34 Ch. D., 234	275, 298, 299, 305, 306, 308, 312, 324
Forbes v. Ameeroonissa Begum, 10 Moo., I. A., 340	405, 410, 411

G	
Ganga Sahai v. Lekhr Singh, I. L. R., 9 All., 253	101, 106, 107, 408, 408
Gayford v. Moffatt, L. R., 4, Ch. A. 133	186, 187
Gandharap Singh v. Lachman Singh, I. L. R., 10 All., 485	158
Gobind Prasad v. Chandar Sekhar, I. L. R., 9 All., 486	524, 527
Gopal Pandey v. Parsotam Das, I. L. R., 5 All., 121	381, 384

H	
Hanuman Tiwari v. Chirai, I. L. R., 2 All., 154	67, 95, 99, 105, 117, 109
Hafiz-ud-din Ahmad v. Damodar Das, Weekly Notes, 1889, p. 149	514, 516
Hardi Narain Sahu v. Ruder Perakash Misser, I. L. R., 10 Calc., 626	191
Hazari Ram v. Shankar Dial, I. L. R., 3 All., 770	405, 408, 411
Hoshnak v. Tarmal Singh, Panjab Record, No. 57 of 1881	137
Hossein Ali Beg v. Ashruff Ali Beg, N.-W. P., S. D. A., Rep. 1865, p. 221	381, 404
Hulas Rai v. Pirithi Singh, I. L. R., 9 All., 509	554, 520
Hunooman Parsad v. Munraj Koonwerree, 6 Moo. I. A., 393	420, 423, 428
Hurkish Chunder Chowdhry v. Kalisunderi Debia, L. R., 10, I. A., 4 s. c., I. L. R., 9 Calc., 482	226, 230
Hury Doyal Guho v. Din Doyal Guho, I. L. R., 9 Calc., 479	341

TABLE OF CASES CITED.

v

Page.

I

In the matter of the petition of Dinonath Mullick, I. L. R., 12 Calc., 133	49
In the matter of the petition of Jai Parkash Lal, I. L. R., 6 All., 26	49
In the matter of the petition of Rajendra Chunder Roy Chowdhry, I. L. R., 11 Calc., 737	49

J

Jagadamba Chowdhurani v. Dakhina Mohun, L. R., 13, I. A., 84, s. c., I. R.L., 13, Calc., 308	56
Jai Devi v. Mathura Das, Weekly Notes, 1888, p. 193	415
Jai Karan Rai v. Ganga Dhari Rai, I. L. R., 3 All., 175	405, 410
Janki v. Girjadar, I. L. R., 7 All., 482	334
Jeorakhun Singh v. Hookum Singh, N.-W. P. H. C. Rep., 1868, p. 358	405, 408, 411
Jilewnti Nath Khan v. Shib Nath Chukerbutty, I. L. R., 8 Calc., 819	512, 513
Jonmenjoy Mullick v. Doss Money Dossee, I. L. R., 7 Calc., 714	303
Jyeperkash v. Sheopurshad, N.-W. P., S. D. A. Rep., 1864, Vol. I., p. 230	381, 399

K

Kali Das Keval Das v. Nathu Bhagvan, I. L. R., 7 Bom., 217	524, 527
Kalka Prasad v. Chandan Singh, I. L. R., 10 All., 20	32, 33
Kameswar Pershad v. Run Bahadoor Singh, L. R., 8 I. A., 8 I. L. R., 6 Calc., 843	423
Kaniz Fatima v. Abbas Ali, Weekly Notes, 1887, p. 84	9, 12
Karamat Ali v. Inayat Husain Weekly Notes, 1884, p. 329	354
Kedar Nath v. Lalji Sahai, I. L. R., 13 All., 61	221, 222
Khem Karan v. Har Dayal, I. L. R., 4 All., 37	499
Kinnu Ram Das v. Mozaffer Hosain Sahai, I. L. R., 14 Calc., 809	274, 297, 304, 308, 311, 321, 322, 323, 327, 329
Kodai Singh v. Jaisri Singh, I. L. R., 13 All., 376	354, 529, 631
Kristo Mohinee Dossee v. Kaliprosono Ghose, I. L. R., 8 Calc., 402	326, 330

L

Lachman Singh v. Salig Ram, I. L. R., 8 All., 384	303, 326, 329, 330
Lakshmappa v. Ramaya, 12 Bom., H. C. Rep., 364	82, 92, 94
Leslie v. French, L. R., 23 Ch. D., 552	275, 298, 328

M

Madayya v. Yenkata, I. L. R., 11 Mad. 193	30, 33, 34
Madho Lal v. Sheo Prasad Misr, I. L. R., 12 All., 419	224
Mahadeo Singh v. Bachu Singh, I. L. R., 11 All., 224	381, 393
Mahomed Badsha v. Nicol, Fleming and others, I. L. R., 4 Calc., 255	369
Muhammed Bukhsh Khan v. Hosseini Bibi, I. L. R., 15 Calc., 684	9, 12
Majja Singh v. Ram Singh, Panjab Record, No. 43 of 1879	137
Manekji Framji v. Hustomji Naserwanji Mistry, I. L. R., 14 Bom., 269, 238, 241	241
Manik Chunder Dutt v. Bhuggobutty Dossee, I. L. R., 3 Calc., 443, 82, 89, 94, 111	111
Manikachella v. Sudhachella, I. L. R., 15 Mad., 258	329
Maruti Sukha Ram v. Babaji, I. L. R., 15 Bom., 87	191

TABLE OF CASES CITED.

	Page.
Masum Ali v. Mohsin Ali, Weekly Notes, 1890, p. 201	415
Mata Deen v. Chundee Deen, N.-W. P. H. C. Rep., 1870, p. 54	381, 400
Mata Deen Doobey v. Chunlee Deen Doobey, N.-W. P., H. C. Rep., 1874, p. 118	381, 399
Miller v. Digambari Debya, Weekly Notes 1890, p. 142	514, 516
Mohima Chunder Mozoomdar v. Mahesh Chunder Neoghi, I. L. R., 16 Calc., 473	194, 195
Mohunt Ajoodhya Pooree v. Sohun Lal, 7 W. R., C. R., 428	405, 408, 411
Moonshee Syud Ameer Ali v. haboo Soonduree Debia, 6 W. R. C. R., 116	405, 408, 411
Muhammad Naim-ul-lah Khan v. Ihsan ul-lah Khan, Weekly Notes, 1892, p. 14	203
Musammatt Chundo v. Hakeem Alim-ood-deen, N.-W. P., H. C. Rep., 1874, p. 28	197, 198
Musammatt Labbi Beebee v. Musammatt Bibbun Beebee, N.-W. P., H. C. Rep., 1874, p. 59	488
Musammatt Tara Kunwar v. Mungri Meea, 7 B. L. R., App. 114	405, 408, 411
Musammatt Tikday v. Hurree Lal, W. R., 1864, Gap. No. 133	89
Muzhurool Huq v. Puhraj Ditary Mohapattur, 13 W. R., 235	375, 377

N

Nanbat Ram v. Harnam Das, Weekly Notes, 1888, p. 37	287
Nawab Amin-ood-dowlah v. Syud Aoshun Ali Khan, 5 Moo. I. A., 199	463
Narsini Kuar v. Chandin Din and others, I. L. R., 9 All., 467	337
Narayanamsami v. Kupusami, I. L. R., 11 Mad., 43	94
Narendra Narayan Roy Chowdhry v. Ishan Chandra Sen, 13 B. L. R., 288	385, 387
Nasir Khan v. Karamat Khan, I. L. R., 3 All., 168	33
Natha Singh v. Jodha Singh, I. L. R., 6 All., 406	490
Nilmadhuh Doss v. Bissumbhur Doss, 13 Moo. I. A., 85	96
Nugendra Chunder Ghose v. Sreemutty Kaminee Dossee, 11 Moo. I. A., 241	303, 325, 327, 330
Nndram v. Kashoe Pandey, 4 Sel. Rep., 70	92, 111
Nura Bibi v. Jagat Narain, I. L. R., 8 All., 295	1, 3, 4, 5, 6, 7

O

Opendur Lal Roy v. Raneé Bromo Moyee, 10 W. R., 347	98
---	----

P

Pandah Gazi v. Jennuddi, I. L. R., 6 Bom., 592	31
Parmanand Misr v. Sahib Ali, I. L. R., 11 All., 438	194, 190
Payag Sahu v. Matadiu, Weekly Notes, 1890, p. 229	50, 57
Pem Singh v. Partab Singh, I. L. R., 14 All., 179	405, 407, 411
Puran Chand v. Roy Radha Kishen, I. L. R., 19 Calc., 132	53, 533

Q

Queen v. Collins, L. and C 471, s.c. 33, L. J., M. C., 177	45
Queen-Empress v. Grees Chunder Banerji, I. L. R., 10 Calc., 1024	213, 216
Queen-Empress v. Kartick Chunder Das, I. L. R., 14 Calc., 721	146, 149

TABLE OF CASES CITED.

vii

	Page.
Queen-Empress v. Krishnaji Babu Rav Bulell, I. L. R., 14 Bom., 430 ...	213, 215, 216
— v. Sarat Chandra Rakhit, I. L. R., 16 Calc., 766 ...	355
— v. Solomon, I. L. R., 17 Calc., 930 ...	213, 215, 216

R

Radha Prasad Singh v. Pergash Rai, I. L. R., 13 All., 193 ...	50, 51
Rahim Baksh v. Dhuri, I. L. R., 12 All., 397 ...	201, 206, 207, 208, 209
Raghubar Singh v. Lachmi Narain, Weekly Notes, 1887, p. 291 ...	182
Raghubir Sahai v. Bunyad Ali, Weekly Notes, 1889, p. 152 ...	1, 5
Raghubir Singh v. Nanda Singh, Weekly Notes, 189., p. 134 ...	341, 342, 343
Raghunath Das. v. Rajkumar, I. L. R., 7 All., 876 ...	234
Raisuddin Chowdhry v. Khodu Newaz Chowdhry, 12 C. L. R., 479 ...	405, 410
Raj Lukhee Dabea v. Gokool Chunder Chowdhry, 13 Moo. I. A., 209 ...	380, 423
Raj Singh v. Permanand, I. L. R., 11 All., 486 ...	514, 516
Raja Deedar Hossin v. Ranees Zahoor-un-nissa, 2 Moo. I. A., 441 ...	449
Raja Har Narain Singh v. Chaudhrain Bhagwant Kuar, L. R., 18 I. A., 55, s. c., L. R., 13 All., 300 ...	343, 345, 348
Rajendro Narain Lahoree v. Saroda Soonduree Debia, 15 W. R., 548 ...	102
Rajjo v. Lalman, I. L. R., 5 All., 180 ...	197, 198
Ramalakshmi Ammal v. Sivanantha Perumal Sethurayer, 14 Moo. I. A., 570 ...	115
Ramcoomar Koondoo v. Macqueen, L. R., I. A., Supp. Vol. 40 ...	364
Ramdhani Sahai v. Rajrani Kooer, I. L. R., 7 Calc., 337 ...	202
Ram Dial v. Ram Das, I. L. R., 1 All., 181 ...	201, 205, 207
Rameshur Singh v. Sheodin Singh, I. L. R., 12 All., 510 ...	349
Ram Kirpal v. Rup Kuari, I. L. R., 6 All., 269 ...	64, 66, 343, 349
Ramphal Bai v. Tula Kuari, I. L. R., 6 All., 116 ...	377, 379
Ramsebuk v. Ram Lall Koondoo, I. L. R., 6 Calc., 815 ...	524, 527
Ramsidh Pande v. Balgobind, I. L. R., 9 All., 168 ...	163
Ram Singh v. Baldeo Singh, Weekly Notes. 1855, p. 309 ...	1, 5, 7
Ranjit Singh v. Ilahi Baksh, I. L. R., 5 All., 520 ...	501
Rasik Lal v. Gajraj Singh, I. L. R., 4 All., 414 ...	405, 410
Regina v. Brown, L. R., 10 Q. B. D., 381 ...	43, 44
— v. Francis Cassidy, 4 Bom., H. C. Rep. (Crown Cases), 17 ...	40, 42
— v. Gaji Kom Ranu, I. L. R., 1 Bom., 311 ...	355
— v. Lewis, 9 C. and P., 553 ...	44
— v. St. George, 9 C. and P., 483 ...	44
— v. Briggs, 2 M. and R., 199 ...	502, 505
Romesh Chunder Sannyal v. Hiru Mondal, I. L. R., 17 Calc., 852 ...	146, 149

S

Sadu c. Sambhu, I. L. R., 4 Calc., 665 ...	33
Sahib-un-nissa Bibi v. Hafiza Bibi, I. L. R., 9 All., 218 ...	197
Sambasiva v. Ragava, I. L. R., 13 Mad., 512 ...	157
Sarat Chandra Chakarbaty v. Forman, I. L. R., 12 All., 213 ...	36, 38
Saroda Soondury Dossee v. Doya Moyee Dossee, I. L. R., 5 Calc., 938 ...	158
Savitri v. Ramji, I. L. R., 14 Bom., 232... ..	350
Secretary of State for India v. Narayanan, I. L. R., 8 Mad., 130 ...	328
Shadi Lal v. Thakur Das, I. L. R., 12 All., 175 ...	163
Shaikh Idrus v. Vithal Bakhmaji, Printed Judgments for 1879, p. 407 ...	328

	Page.
Sheik Mahomed Ahsan-ulla Chowdhry v. Amarchand Kundu, L. R., 17	
I. A., 28	375, 376, 377
Sheshagiri v. Pichu, I. L. R., 11 Mad., 452	328, 329
Shib Singh v. Sita Ram, I. L. R., 13 All., 76	162, 167
Shunmugam v. Moidin, I. L. R., 8 Mad., 229	168
Simbhu Nath Pande v. Golab Singh, I. L. R., 14 Calc., 572	182
Sohna v. Khalak Singh, I. L. R., 13 All., 78	56
Sonatan Shah v. Ali Newaz Khan, I. L. R., 16 Calc., 423	514, 518
Soudagar Mal v. Abdul Rahman Khan, Weekly Notes, 1890, p. 85 201, 202, 206	208, 209
Sri Ammi Devi Goru v. Sri Vikrama Deon, L. R., 15, I. A., 176	100
Sri Nath Kur v. Prosunno Kumar Ghose, I. L. R., 9 Calc., 934, 156, 157, 159, 161	
Srimati Uma Deyi v. Gokoolanund Das Mahapatra, L. R., 5, I. A., 40	98
Sundar v. Parbati, L. R., 16, I. A., 186	56
Sundriah v. The Queen, I. L. R., 3 Mad., 251	355
Suraj Din v. Chattar, I. L. R., 3 All., 755	348, 349
Surajpal Singh v. Jairam Gir, I. L. R., 7 All., 855	32
Surta v. Gunga, I. L. R., 7 All., 875	234
Sutton v. Sutton, 22 Ch. D., 515	514, 519
Syed Enayet Hossain v. Muddun Mooneo Shahoon, 14 B. L. R., 155	326
Syed Emam Montaz-ood-deen Mahomed v. Rajcoomar Doss, 14 B. L. R.,	
408	302

T

Tawakkul Rai, v. Lachman Rai, I. L. R., 6 All., 344	405, 408, 411, 412
The Collector of Madura v. Moottoo Ramalinga Sethupathy, 12 Moo.,	
I. A., 397	81
The Collector of Masulipatam v. Cavalry Vencata Narrainapah, 8 Moo.,	
I. A., 500	423
The Oriental Bank Corporation v. Charriol, I. L. R., 12 Calc., 642	524, 528
Thumbusamy Moodelly v. Mahomed Hussain Rowthen, L. R., 2 I. A.,	
241, s. c., I. L. R., 1 Mad., 1	197
Tulshi Ram v. Behari Lal, I. L. R., 12 All., 328	73, 106, 107, 108

U

Uda Begam v. Imam-ud-din, I. L. R., 1 All., 82	367
Udat Singh v. Padarath Singh, I. L. R., 8 All., 54	495, 404
Umed Ram v. Dalut Ram, I. L. R., 5 All., 564	31, 33
Umr-un-nissa v. Muhammad Yar Khan, 7 L. R., 3 All., 24	1, 3, 6
Upendra Lal Roy v. Srimati Rani Prasanna Mayi, 1 B. L. R., A. C., 221	
Uporoop Tewary v. Lalla Bandhjee Subay, I. L. R., 6 Calc., 749	82, 87, 111
	184

V

Varden Seth Sam v. Luckpathy, Royjee Lallah, 9 Moo., I. A., 303	238, 240
Vasudeva Shanbog v. Naraina Pai, I. L. R., 2 Mad., 356	141, 144
Vaidinada v. Appu, I. L. R., 9 Mad., 44	57

TABLE OF CASES CITED.

ix

	Page.
Vyankatray Annandray Nimbalkar v. Jayavantray Bin M. Ranadive, 4 Bom. H. C. Rep., A. C., 191	98

W

Waman Raghupati Bova v. Krishnaji Kashiraj Bova, I. L. R., 14 Bom., 249	93, 108, 109, 111
Waris Ali v. Muhammad Ismail, I. L. R., 8 All., 552	381, 394
Wasiq Ali Khah v. The Government, 6, S. D. A. L. R., 110	449
Wazir Muhammad v. Amanat Khan, Weekly Notes, 1883, p. 172	381, 400

Y

Yusuf Ali v. The Collector of Tippera, I. L. R., 9 Calc., 138	488
--	-----

THE
INDIAN LAW REPORTS,
Allahabad Series.

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FULL BENCH.
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*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight and Mr.
Justice Mahmood.*

ASHFAQ AHMAD AND OTHERS (PLAINTIFFS) v. WAZIR ALI AND
OTHERS (DEFENDANTS.)

1889
January 18.

*Mortgage—Joint Mortgage—Redemption of the whole by one co-mortgagor—
Rights of redeeming co-mortgagor as against the others—Limitation—
Act XV of 1877 (Limitation Act) Schedule II Art 148.*

Where one of several co-mortgagors redeems the whole mortgage he thereby puts himself into the position of the mortgagee as regards that portion of the mortgaged property which represents the interests of the other co-mortgagors, and the period of limitation applicable to a suit for redemption brought by the other co-mortgagors is that provided for by Art. 148 of Sch. II of the Limitation Act (XV of 1877). Such period begins to run from the date when the original mortgage was redeemable and not from the date of its redemption by the aforesaid co-mortgagor *Nura Bibi v. Jagat Narain* (1) and *Raghubir Sahai v. Bunyad Ali* (2) followed: *Umr-un-nissa v. Muhammad Yar Khan* (3) distinguished: *Ram Singh v. Baldeo Singh* (4) referred to.

In this case one Ahmad Ali, the common ancestor of both parties, mortgaged certain property by a usufructuary mortgage on the 5th July 1822. Ahmad Ali died in 1825 leaving four daughters who also subsequently died. After this Khwaj Bakhsh, the husband of one of them, redeemed the whole of the property in 1828. On the 5th February 1886, the plaintiffs, who were the representatives of one of the daughters of Ahmad Ali, brought their suit against the defendants, who were representatives of the other three

(1) I.L.R., 8 All., 295.

(2) Weekly Notes 1886. p. 152.

(3) I.L.R., 3 All., 24

(4) Weekly Notes 1885, p. 500.

1889 daughters, to recover possession of a $\frac{1}{4}$ share of the property redeemed by Khwaj Bakhsh. The Court of first instance decreed the plaintiffs' claim. The defendants then appealed, and the lower appellate Court decreed the appeal and dismissed the plaintiffs' suit, on the ground that it was barred by limitation ; holding that, if the plaintiffs claimed on the hypothesis that the defendants, the representatives of Khwaj Bakhsh were representatives of the original mortgagee, then Art. 148 of the second schedule of the Limitation Act applied and limitation began to run from the date of the original mortgage in 1822 ; while on any other hypothesis the possession of Khwaj Bakhsh and his representatives would have been adverse and the suit would be barred under Art. 144 of Sch. II of the same Act. The case came in second appeal before Mahmood, J., who, by his order of the 17th July 1888, directed it to be laid before the Chief Justice for orders as to its being referred to a Division Bench. Subsequently, on the recommendation of Straight and Mahmood, J.J., the case was laid before a bench consisting of Edge, C. J., Straight and Mahmood, J.J.

Mr. *Abdul Majid* and Pandit *Moti Lal*, for the appellants.

Pandit *Sundar Lal*, for the respondents.

EDGE, C. J.—This was a suit for redemption of mortgage. The original mortgage was a usufructuary mortgage of 1822. One of mortgagors redeemed the whole of the property in 1828. This suit was brought against his heirs on the 5th February 1886. The lower appellate Court dismissed the suit on the ground that it was barred by limitation. In my opinion the limitation applicable in a case of this kind is the limitation which would have been applicable if the original mortgagee or his heirs had been the defendants to the redemption suit, that is, if Art. 148 of the Limitation Act applies, the period does not run from the date of the redemption of the whole property by one of the co-mortgagors, but from the time it would have run against the original mortgagee if he had been a defendant in the suit. As I understand the law, when one of two or more co-mortgagors redeems the whole, he, as to the portion which represents the interest of his co-mortgagors, stands in the

shoes of the mortgagee from whom he redeems, and, standing in those shoes, it appears to me that he has got the same rights and the same liabilities. If Art. 148 applies, as I think it does, this suit is barred by time. If the ruling of the Full Bench in the case of *Umr-ur-nissa v. Muhammad Yar Khan* (1) be correct and exhaustive, then also the suit is barred, as more than 12 years have run since the date of the redemption of the mortgage by the ancestor of the defendants; so in either case the plaintiffs' suit must fail. The ruling of the Full Bench above referred to was explained by my brother Straight and my brother Tyrrell in the case of *Nura Bibi v. Jagot Narain* (2). It appears from that explanation that the attention of the Full Bench was not drawn to the question whether Art. 148 of the Limitation Act was one applicable to the case. There the attention of the Full Bench having been confined to the article before them, the result arrived at was that Art. 144 was held applicable. This appeal therefore must be dismissed with costs.

1889

ASHFAQ

AHMAD

v.

WAZIR ALI.

STRAIGHT, J.—The facts out of which the question raised by this reference arose are very fully stated in the referring order of my brother Mahmood and it is wholly unnecessary to repeat them now. The learned Chief Justice has summarised the position of the parties to the litigation out of which this appeal arose by saying that this is a suit by the plaintiffs, appellants before us, for redemption of their share of certain property mortgaged in the year 1822 from the defendants-respondents, who are the representatives of one of the original mortgagors, who in the year 1828 redeemed the whole of the mortgaged property. The three questions stated by my brother Mahmood in his referring order are :—

(1) Is this suit governed by Art. 148 or Art. 144 of the Limitation Act ?

(2) If by Art. 148, is the starting point of the period of limitation the date of the mortgage of 1822 or the date of the redemption of 1828 ?

(3) If Art. 144 applies, is the defendants' possession acquired under the redemption of 1828 to be taken as adverse to the plaintiffs' from that date ?

1889

ASHFAQ
AHMAD
v.
WAZIR ALI.

It will be convenient for me at once to deal with the obvious matter that was passing through the mind of my brother Mahmood at the time he made the reference of these questions with regard to the applicability of Art. 144 to facts like those disclosed here. No doubt what was present to his mind was a decision of the Full Bench passed in the year 1880 and reported in I. L. R., 3 All. 24 (*Umr-un-nissa v. Muhammad Yar Khan*). I have already, as the learned Chief Justice has observed, taken occasion, in conjunction with my brother Tyrrell, in the case of *Aura Bibi v. Jagot Narain* (1) to explain the circumstances under which that particular ruling was delivered by the Full Bench. Having again refreshed my memory by reference to it, I am convinced that I was right in saying that the whole argument of the Full Bench proceeded upon the assumption that Art. 144 of the Limitation Act was the article applicable to those particular facts, and, assuming that particular article applicable, the question was whether, as stated in the order of reference of the two learned Judges, there had been such physical possession as would lay the foundation for finding adverse possession. I am quite convinced that the equitable principle which was then recognised, under which a co-mortgagor redeeming for his other mortgagors was entitled upon redemption of the whole mortgage to hold their share as against them as security for the mortgage, was never referred to or discussed, and there was at that time no statutory provision in force which could have been brought to the attention of the Judges of the Full Bench to show that Art. 148 was the Limitation article applicable. Therefore, in so far as there is anything in that case to militate with the contention now raised, it must be taken that that case never did decide and must not be regarded as an authority for deciding that Art. 148 is not applicable to such facts as we have here. Therefore it must be dismissed from consideration in dealing with the questions submitted to us.

Then arises the question whether Art. 148 is applicable, and if so from what date does the limitation begin to run? Does it run from the date of the original mortgage, or does it run from the date

(1) I. L. R. 8 All. 295.

of the redemption of the whole mortgage by one of the co-mortgagors? As to Art. 148 being applicable, I have no doubt. I have already committed myself to that view in the case of *Nura Bibi v. Jagat Narain* (1) and there have been several other rulings to the same effect; among others, one reported in the Weekly Notes of 1889, page 152, *Raghubir Sahai v. Bunyad Ali*. Further, even before the Transfer of Property Act came into operation, I took the view that a co-mortgagor redeeming the whole mortgage stood in the shoes of the original mortgagee and was entitled to all the rights and the incidents connected with his estate. The principle that underlies that is, that he, having paid off the obligation to the creditor, is entitled to take advantage of all the incidents connected with the security as it stood in the hands of the mortgagee, or, in other words, he is entitled to all the rights and incidents connected with the mortgage as they were in the hands of the mortgagee at the time the redemption took place. Amongst others he cannot say that a new mortgage transaction commenced from that particular date, but his position as mortgagee stands upon the same footing as it would have if the original mortgagee had assigned over to him by sale his mortgagee interest. Not only do I think that a co-mortgagor redeeming the whole mortgage stands in the position of the original mortgagee, but that time runs from the date of the original mortgage. No doubt this view is inconsistent with one expressed by the late Chief Justice, Sir Comer Petheram, in the case of *Ram Singh v. Baldeo Singh* (2). That learned Judge was of the same opinion as I am, as to the applicability of Art. 148 to the facts then before him. But it does not appear to have been seriously discussed before him as to what was the precise date from which the limitation would run. Mr. *Abdul Majid* is entitled to use that judgment in his favor, and it is entitled to all the respect which every utterance of that learned Chief Justice deserves. But I cannot myself agree with the view that the limitation runs from the date when the redemption took place. It must, in my opinion, relate back to the date of the original mortgage, and upon this I have explained my reasons in the case

1889

ASHFAQ

AHMAD

v.

WAZIR ALI.

1889

ASHFAQ
AHMAD

v.

WAZIR ALI.

of *Nura Bibi v. Jagat Narain* (1). The conclusion I have arrived at is the same as that of the learned Chief Justice, *viz.*, that this suit was barred and that this appeal must be dismissed with costs.

MAHMOOD, J.—The facts of the case, as also the points of law raised by the arguments of the parties beforê me when the case first came up before me in the Single Bench, are fully stated in my order of the 17th July 1888, and I regard what I then said as a portion of my judgment to day.

That order shows that, at any rate, the case was a fit one for being disposed of by a Bench consisting of more than one Judge, and it was in consequence of that circumstance that the case was laid before my brother Straight and myself; and by our order of the 6th December 1888 it was laid before the learned Chief Justice for consideration as to whether it may not go before a Bench of three Judges. It is in consequence of this circumstance that this is the third time that this Court is hearing the case, and it has not been due to any other cause than my desire to obtain such authoritative ruling upon the points raised in the case as this Court can give.

The points which arise in the case have been so completely dealt with by the learned Chief Justice and my brother Straight that I should be unnecessarily taking up their time if I dwelt upon the same points or made any endeavour to give expression to any exposition of the law which would minutely deal with the various cases that may arise under it. The question, however, upon which the fate of the case turns requires two things: first, that it should be held by us that Art 144 of Sch. II of the Limitation Act has no reference to suits of this character; and secondly, that suits of this character are governed by Art. 148. Upon both these questions I, who am never content with dealing with any case without dealing also with the *ratio, viz.*, the essential steps of reasoning upon which the judgment proceeds, have no hesitation in saying, with all deference, that the judgment of the Full Bench in *Umr-un-nissa v. Muhammad Yar Khan* (2) proceeds upon a theory of law as to the application of the Act. 144 which I find it impossible to accept.

(1) I L. R. 8 All. 245.

(2) I. L. R. 3 All. 24.

Notwithstanding the clear distinction which my learned brother Straight drew in the case of *Nura Bibi v. Jagat Narain* (1) the result of what we have held to-day is to say that the Full Bench ruling need no longer be referred to for the purpose of finding out the periods of limitation for suits.

1889

ASHFAQ

AHMAD

v.

WAZIR ALL.

Again it is also clear, and I do not wish to add a single word to what has fallen from my brother Straight upon the subject, that the ruling referred to in my referring order, *viz.*, *Ram Singh v. Baldeo Singh* (2) cannot possibly be consistent with the *ratio* upon which our judgment proceeds. The truth is, as I understand the law, that there are various manners and methods whereby a person may stand in the shoes of a mortgagee. There may be a case such as that of an assignee, or there may be a case such as that which the broad principle of equity known as sub-rogation involves. A co-sharer suing for the redemption of the whole of the property and obtaining redemption thereof is not a person in adverse proprietary possession, as the Full Bench ruling would probably require. He is simply by sub-rogation on the same footing as an ordinary person would be as representing the mortgagee, or rather the mortgagee's interest in the property *qua* such of his co-sharers as have not either secured redemption or sued for it.

When in a suit the question arises whether or not a co-sharer can obtain his share from a redeeming co-sharer, the case to my mind is a suit such as Art. 148 contemplates, and such a suit is governed by the 60 years' period. In the present case the original mortgage was so old as the 5th of July 1822. There was no endeavour made to prove that the redemption which took place in 1828 was other than an ordinary redemption by one co-sharer of other co-sharers' property; the present defendants represent the right of the redeeming co-sharer and they are entitled to rely upon the same limitation as Art. 148 would require.

There is, however, because it is on account of that reference of mine that the case has come up before us, one point more that I wish to add. The reference of course relates to four properties, as

(1) Weekly Notes 1885, p. 300.

1891 mentioned in my referring order, and what we have held with regard to this mortgage renders it unnecessary for us to consider the other mortgages mentioned in the judgment of the Court below. The view we have now taken defeats the whole suit. The result is exactly what the learned Chief Justice and my brother Straight have said, *viz*, that this appeal stands dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

1891
February 16. MARIAM BIBI (PLAINTIFF) *v.* SAKINA AND OTHERS (DEFENDANTS).^{*}
Pardah-nashin woman—Conditions necessary to the valid execution of a document by—

Where a deed executed by a *pardah-nashin* woman is sought to be set aside, it is for the party wishing to uphold the deed to show affirmatively that the transaction intended to be carried out by the deed was a reasonable one, that the executant was fully cognizant of the meaning and legal and practical effect thereof and that she executed the same with her full and free consent, that is to say, that she had independent advice on the subject and was not otherwise, as, *e. g.*, by reason of bodily or mental infirmity, or by reason of fraud or coercion practised upon her, incapable of giving a rational consent to the transaction.

One Mariam Bibi a *pardah-nashin* lady of some 70 years of age, and more or less illiterate, executed on the 11th September 1888, a deed which purported to divest her immediately of all her property in favor of her son Murtaza Husen, who was dumb and imbecile, her daughter Sakina, who was named in the deed as guardian of Murtaza Husen, and that daughter's son, Muhammad Yakub. Muhammad Yakub was betrothed to a daughter of one Fakir Husen and one of Sakina's daughters was married to one Shakurul Husen. Those two persons, *viz.*, Fakir Husen and Shakurul Husen were mainly instrumental in procuring the execution of the deed in question. The deed was drafted in very artificial language, and it was not shown that the executant ever understood its contents or effect. The executant was moreover at the time of execution in ill health and great mental distress, owing to the death of her son, Muhammad Husen, which had happened some months previously. The deed was also executed in the absence of the person who was at that time the executant's chief adviser and the manager of her property. Lastly, it appeared that as soon as the executant came to know what the true nature of the deed was and that

^{*} First Appeal No. 189 of 1889 from a decree of Maulvi Shah Ahmad-ullah, Subordinate Judge of Allahabad, dated the 20th August 1889.

proceedings had been initiated in the Revenue Department for mutation of names, she took immediate measures to show her dissent from the provisions of the deed and her disapproval of what had been done thereunder.

Held that under the circumstances above set forth the deed in question could not be considered as having been executed under the conditions necessary in such cases and must be set aside. *Ashgar Ali v. Debroos Banoo Begum* (1). *Mohomed Bukhsh Khan v. Hussaini Bibi* (2) *Behari Lal v. Habiba Bibi* (3) and *Kaniz Fatima v. Abbas Ali* (4) referred to.

THE facts of this case are sufficiently stated in the judgment of Tyrrell, J.

Pandit *Sundar Lal* and Munshi *Ghulam Muftaba*, for the appellant.

Munshi *Kashi Prasad*, for the respondents.

TYRRELL, J.—The appellant brought a suit to obtain a declaration that a deed executed by her on the 11th September 1888, may be declared null and void, on the ground that it was fraudulently framed so as not to express her intentions in executing it and is therefore inoperative and null. The defendants are her daughter, the minor son of that daughter, and the plaintiff's adult son, who is dumb and imbecile. The suit was instituted on the 22nd February 1889, and was dismissed by the Subordinate Judge of Allahabad on the 20th August 1889. The defence to the suit was that the deed expresses the declared and true intentions of the plaintiff, who with full knowledge of its contents was a party to its registration and to the subsequent application for mutation of names in favor of the defendants under the terms of the deed and to the possession of the defendants in accordance with the deed. The plaintiff is over 70 years of age, and on the 11th September 1888 was the absolute owner in her own right of an 8 anna share in Rahmanpur in the Allahabad district, with groves appertaining to the same and a house in Rahmanpur, and also of a 2 anna 8 pie *m'afi* estate in the village Amwa in the Mirzapur district, and also of certain decrees and outstanding claims for money, the entire property being valued roundly at 10,000 or 11,000 rupees. Half of the 8 annas zamindári share of Rahmanpur was at the time in

1891

MARIAM
BIBI
v.
SAKINA.

(1) I. L. R., 3 Calc., 324.

(2) I. L. R., 15 Calc., 684.

(3) I. L. R., 8 All., 627.

(4) Weekly Notes 1887 p. 84

1891

MARIAM
BIBI
v.
SAKINA.

possession of a mortgagee, but the rest of the property was in the possession of the plaintiff and the plaintiff had acquired this property, not through her deceased husband, but from her own family and otherwise. She had by her deceased husband two sons, the elder, now about 50, being the defendant Murtaza Husen, *alias* Chatar, dumb and imbecile, who lived with and on his mother, the younger named Syed Muhammad Husen, who died in February 1888, aged 45 years, and a daughter, the female defendant, whose minor son, the defendant Muhammad Yakub, is engaged to be married to the daughter of Fakir Husen of Sheikhpur, who was the principal agent in the execution of the deed in question. The loss of her second son, who was the prop of his mother's old age and manager of her estate and business, plunged the plaintiff into the deepest grief, and in August 1888 she fell into severe sickness which made her anxious to dispose of her property before she died. She says in her plaint that her idea was to set apart $\frac{1}{3}$ of her estate for religious objects to the spiritual benefit of herself and her deceased son and to devise the remaining $\frac{2}{3}$ to her daughter Sakina and her imbecile son, who were to take possession thereof in shares in accordance with their interest under the Muhammadan law of succession after her death. At this time her daughter and the minor defendant, whose place of residence is in the Jaunpur district, were on a visit to the plaintiff who had recently negotiated the marriage of Musammat Sakina's daughter with one Shakurul Husen, a resident of Sheikhpur and the betrothal of Musammat Sakina's minor son, the defendant Yakub, with the daughter of Fakir Husen, also a resident of Sheikhpur in the Allahabad district. In the month of September 1888, the plaintiff says that her daughter Sakina, in co-operation with this Shakhurul Husen and Fakir Husen, under pretence of bringing about the execution of a deed to carry out the above intentions of the plaintiff, took her away from her house in Rahmanpur to their own place some 7 or 8 kos distant and there made her a party to the execution and registration of the deed of the 11th September 1888, and to the initiation of proceedings in the local Revenue Office in connection therewith. The plaintiff alleges

that she was wholly unaware of the main contents and of the legal and actual effect of the deed ; that she had no idea that it was a deed which would or could have operative effect in her lifetime ; that she was also ignorant of the purport of the application in the Revenue Department, and that it was not till late in October 1888 that she became aware that proceedings were on foot to expunge her name from the public records of title and possession of her Allahabad property. She promptly protested in the Phulpurtahsil office against the proposed alteration in the public record, but without success, and her appeal in this respect to the Collector of the district was disallowed on the 11th February 1889. In these objections she stated from the first that the respondents had taken advantage of her old age and practised deceit and fraud upon her in the execution and registration of a deed. She derives her cause of action from these proceedings, but declares that no change of possession, in fact, has as yet taken place in respect either of her title or her possession of the property, the subject matter of the suit. The defendant, Musammat Sakina, for herself and as guardian of her minor son Yakub and her imbecile brother Murtaza, admitting the execution and registration of the deed and the institution of the mutation proceedings, denied that the plaintiff was ignorant of any of the terms or of the effect of the deed, maintaining that she was made aware of them and was a party to them with the fullest knowledge, notice and assent. The defendants also claimed to have obtained complete possession under the deed.

1891

MARIAM
BIBI
v.
SAKINA.

The issues set down for trial were :—

(1). Of possession.

(2). Of the knowledge and notice with which the plaintiff executed the deed, *i. e.*, whether the plaintiff, had full knowledge, notice and consenting power in respect of all the terms and of the legal effect of the deed, or the execution thereof was procured by or for the defendants through fraud practised on the plaintiff.

The Court below found that the deed was executed with the full knowledge and understanding of the plaintiff, who at the time had full disposing power, and that possession had consequently

1891
 MARIAN
 BIBI
 v.
 SAKINA.

been delivered to the defendants. I will consider afterwards, as the case was argued before us at length upon all the issues, the evidence and the reasonings which led the Court below to these findings, both of which are in my judgment incorrect. But the main and paramount question raised by the pleadings has not been sufficiently, if at all, taken into consideration in the trial of the case, although it is and must be the real pivot of decision in actions like this for relief from the operation of a deed admittedly executed but challenged on the ground of fraud. This issue of course is whether the Court had reason to be satisfied that the plaintiff appellant was in the true and full sense of the word a consenting party to the deed of the 11th September 1888; that the meaning of all the phrases and clauses of the deed were fully explained to the plaintiff; that she knew, not only what she was doing, but also what the legal and practical effect of the deed to her and her estate would be; and that there was evidence of entire good faith (*uberrimae fidei*) in respect of the entire contract and the proceedings consequent thereupon. The law on this subject has been fully explained in many judgments of their Lordships of the Privy Council, notably in the case of *Asghar Ali v. Debroos Banoo Begum* (1), in which it was laid down as a general rule that "it is incumbent on the Court, when dealing with the disposition of her property by a *parda-nashin* woman, to be satisfied that the transaction was explained to her and that she knew what she was doing, and specially so in a case *** where, for no consideration and without any equivalent, a lady has executed a document which deprives her of all property."

This and other rulings are referred to in detail in the cases of *Behari Lal v. Habiba Bibi* (2) and *Kaniz Fatima v. Abbas Ali* (3), in both of which judgment was delivered by my brother Straight, and in *Mahomed Bukhs Khan v. Hosseini Bibi* (4) where the Judicial Committee laid down the following tests as being generally applicable to all cases of deeds executed by *parda-nashin* women in the East, tests which are still more forcibly applicable to a case like the

(1) I. L. R., 3 Calc., 324, at p. 327.

(2) I. L. R., 8 All., 267.

(3) Weekly Notes 1887, p. 84.

(4) I. L. R., 15 Calc., 634.

sent, where all the circumstances of the plaintiff and the medical evidence on the record raise serious doubts whether she was in the months of September and October 1888 in the true and full sense of the words *compos mentis* for the transactions in question. We have to see whether the arrangements embodied in the deed of the 11th September 1888 were righteous in their character, whether they were provident or improvident in regard to the old lady, the plaintiff, whether the arrangements were such as to require that she had previous independent advice regarding them; and what was the origin of her intention to act in the ways the document sets out. Now, except in regard to her mental health and the presumable good will of the parties around her at the time, the Court below has not considered any of these points, and it was frankly admitted at the hearing of the appeal by the learned Counsel for the respondents that the record contains no evidence and no materials for a finding on the paramount question of independent advice. We have an executant far advanced in years, over 70 years of age, shattered in health, and more particularly in her nervous organisation, by an overwhelming calamity which had left her for the first time for very many years without any independent counsellor in her own house. She is evidently a woman of an excitable and morbid temperament. She is illiterate, and she was surrounded by persons who had considerable and conflicting interest in the disposition of her estate. It appears that, though her daughter Sakina Bibi lived mostly with her husband in the Jaunpur district, the plaintiff had been helpful in the nurture and education of her young family, the minor son Yakub being educated and cared for at the plaintiff's house. It also appears that the defendant Murtaza was the almost helpless object of the plaintiff's care and support, but under the Muhammadan Law the defendant Sakina and her brother Murtaza would be the sole heirs upon her death of the plaintiff's property, the former presumably taking $\frac{1}{3}$ and the latter $\frac{2}{3}$ of the whole. On the death of her son, Muhammad Husen, one Yad Ali, a nephew of the plaintiff, took his place in the management of her affairs, and we find that his sister is married to the imbecile Murtaza. I noticed above that Shakurul Husen is married to one of Sakina Bibi's

1891

MARIAM
BIBI
v.
SAKINA.

1891

MARIAM
BIBI
v.
SAKINA.

daughters, while her minor son Yakub is betrothed to the daughter of Fakir Husen of Sheikhpur. Thus it would be to the interest of Shakurul Husen and Fakir Husen that some provision should be made for Musammat Sakina Bibi's son and daughter just mentioned. One of the modes for effecting this would be to cut down the lawful share of the imbecile defendant and to increase that of Sakina Bibi, an arrangement which would be obviously distasteful to Yad Ali, the brother-in-law of the imbecile heir Murtaza. Evidently, then, here was a case peculiarly calling for independent advice. We will see later on how this condition was fulfilled. To apply the other tests mentioned above, it will be convenient now to glance at the deed. It is printed at page 12 of the appellant's book and is No. 6 of the record. It sets out that Mariam Bibi, aged 70 years, desired to divide all her property among her offspring and heirs and to put every one of them in possession of shares and property "*during her lifetime*." I may observe here that the document, which is of considerable length, is couched in technical and artificial phraseology, the terms used being generally foreign in their character, mainly Arabic, such as would not ordinarily, or at least readily, be understood by an old, infirm, illiterate and partially deaf woman. For example, the very important words "*during my lifetime*" are in the vernacular of the deed "*ba hayât apne*," whereas a person like the plaintiff would certainly not use such a phrase, but would say "*apni zindagi men*" or "*jub tak ki main zinda rahun*." The property was divided under the deed as follows:—That 8 annas of the Rahmanpur property, with the groves and dwelling house should be given and delivered at once to Mir Murtaza Husen and to Muhammad Yakub in equal shares, and that Musammat Sakina should at once have title and possession of all the Mirzapur *m'afi* property and all the plaintiff's decrees and outstanding debts respecting that estate and that the executant should at once be removed from the Government papers and should have thenceforth no claim to any part of the property. Further, the imbecile defendant Murtaza and his property were placed under the guardianship and protection of Musammat Sakina Bibi. In this way, while half the Allahabad property was given to Sakina Bibi's son Yakub, who was not an

heir at all, Sakina Bibi took all the *m'afi* property in Mirzapur with the decree and other securities attaching thereto, and, in her capacity of guardian of her minor son and imbecile brother, she became practically the mistress of all the Allahabad estate for many years and of Murtaza's half for the full period of his life. The deed was executed in the village of Sheikhpur closely adjoining the village and tahsil of Phulpur, the plaintiff's name was attached to this deed by the pen of Fakir Husen of Sheikhpur, whom I have mentioned above and her signature professes to have been attested by Muhammad Hanif of Sheikhpur, Muhammad Ishaq of Sheikhpur, Wazir Khan of Sheikhpur, Abdul Ghafur of Sheikhpur and Muhammad Bakhsh of Sheikhpur. I have said that the execution of the deed purports to have been attested by these men. It will appear further on that not one of these men was present when the plaintiff's name was put to the document. On the same 11th September 1883, between 3 and 4 o'clock the deed was presented for registration in the tahsil of Phulpur by Fakir Husen, the executant at the time lying in her *doli* outside the building. The registering officer recorded that the plaintiff was identified in the *doli* by Fakir Husen and by Abdul Ghafur, one of the attesting witnesses just mentioned, and he wrote that, "the executant requested that the deed after registration should be handed over to her relation Fakir Husen," and the document was registered upon that day. Immediately afterwards the plaintiff, through the same Fakir Husen and Abdul Ghafur, put in the petition No. 35 of the record praying for expungement of her name and record of those of Murtaza Husen and Muhammad Yakub in lieu thereof for the 8 annas zamindari of Rahmanpur; the minor, Muhammad Yakub, to be and to remain under the guardianship of his mother Musammat Sakina Bibi. The plaintiff was again identified in this office by the same Fakir Husen and Abdul Ghafur, and at the same moment a counter-application for record of the names of Sakina, Murtaza Husen and Muhammad Yakub was put in by Shakurul Husen, son-in-law of Sakina Bibi. When the proceedings had reached this stage the lady was taken to her home in Rahmanpur, where, she said, some weeks afterwards she learned with amazement that she had set proceedings on foot

1891.

 MARIAM
BIBI
v.
SAKINA.

1891

MARIAM
BIBI
v.
SAKIA.

which would divest her of all title to and possession of her Allahabad property. Let us see now what the character of this transaction was. From the plaintiff's point of view, it can hardly be described as a righteous thing that in her old age and infirmities she should have been put entirely at the mercy of her daughter, whose marriage duties required that she should for the most part reside far away from the plaintiff in her husband's house in Jaunpur, while the other persons to whom she had transferred everything she possessed in the world were an adult imbecile and a young boy. The improvidence of the transaction requires no statement, and it appears to me that the disposition of property contained in the deed is as remote as possible from the ideas which are shown to have possessed the old lady's mind when her intention to deal with her property in anticipation of her death originated. I have said above that it is conceded that there is no evidence whatsoever that the plaintiff had any independent advice in respect of the execution of the deed, and this would itself be a sufficient reason for reversing the decree below and for giving the relief she seeks. But I may as well briefly consider the bearing of the evidence upon the other features of the case. It is incumbent upon the defendants who set up and rely upon the deed to show affirmatively that the plaintiff entered into it with full knowledge and understanding and disposing power, and that the entire transaction was free from circumstances throwing any shadow of doubt or suspicion on the inception, execution and application of the deed. The evidence of Yad Ali, whose interest in the case is of a perfectly justifiable and legitimate character, is instructive upon these points. His interest or bias is limited to this, that he objects to see his sister's husband, Murtaza Husen, deprived of his lawful share in the estate under the Muhammadan Law. This desire seems to me to be not only natural, but, looking to the disabilities of Murteza Husen, commendable also. Yad Ali proved that he was the person best qualified to advise the plaintiff in August-September 1888 about the disposal of her property; that he was the person most accessible to her at the time; that her main desire then was to deal with $\frac{1}{3}$ of the property for the spiritual benefit of herself and her favorite son, the remainder,

of the property being left to follow the ordinary course of Muhammadan law at her death. He stated that he was absent from Rah-
manpur in September when the plaintiff was taken alone to the
residence of Fakir Husen in Sheikhpur, and that before she left she
told him in the presence of Fakir Husen in Rahmanpur that
“Fakir Husen agreed in her idea of reserving $\frac{1}{3}$ of the property
for religious purposes and leaving the rest to Sakina and Murtaza
after her death.” He stated that in October he learned by a letter
from Sheikhpur, written by a person practising in the Phulpur tah-
síl, what the real contents of the document were, and he also heard
in this way of the mutation proceedings. He then told the plain-
tiff that the document was not written in the way she meant and
that it contained no provision for religious uses. He said that the
plaintiff at once ordered him to recall the document and to bring
Fakir Husen to her, but that they could not get either the docu-
ment or Fakir Husen. The witness shortly afterwards lodged for-
mal objections, on behalf of his brother-in-law and of the plaintiff,
to the *dakhil kharij* proceedings. The plaintiff gave similar evi-
dence, and though her testimony contains inconsistencies and con-
tradictions, they appear to me to be due to her peculiar condition
at the time when she was ill, nervous weak, excited and indignant.
Her evidence as a whole produced on our minds a strong impres-
sion of its substantial truth and honesty. She swore that her wish
in August and September 1888 was “to give some property in the
name of God and make a mosque for the benefit of myself and my
deceased son in the next world, and that the remainder should remain
in the name of my dumb son and Sakina during my lifetime.” The
latter words were cited by the learned counsel for the respondent in
support of the provisions of the deed putting Sakina and Murtaza
Husen in possession of a part of the property during the plaintiff’s
lifetime, but this would not be the same thing as making over the
property in proprietary possession to any one, and further, however
this might be, it is utterly divergent from the terms of the deed,
which reserve nothing whatsoever for spiritual uses, and devise part
of the property to the minor defendant, Muhammad Yakub. The
plaintiff added that the foundation of the mosque had been laid by

1891

 MARIAM
BIBI
v.
SAKINA.

1891
MARIAM
BIBI
v.
SAKINA.

her, and that she was preparing bricks for building it. She swore that when she was taken to Fakir Husen's house and the execution of the deed was proposed to her she bade them send for Yad Ali, but was put off by Fakir Husen, who said that he was at Allahabad. She swore that Fakir Husen never explained the deed to her, nor read it to her, nor gave it to her. She swore that she had no conversation with the attesting witness Muhammad Hanif, and that she never saw the other attesting witness Wazir. She went further and swore that she did not tell any person in Sheikhpur to witness the deed. She added that she keeps *pardah* from the attesting witness Muhammad Ishaq and she disowned all knowledge of the proceedings after registration at the tahsil of Phulpur. She challenged Fakir Husen, who was present during her examination, "to stand up and any in her presence and in that of the Commissioner taking her evidence that he had explained anything to her." She declared that the moment she heard in October 1888 of the fraud practised upon her, she ejected Sakina Bibi and her family from her house in Rahmanpur. As against this evidence the defence relied on a deposition of the plaintiff made in the Revenue Department on the 10th November 1888, which was admitted in evidence by the Court below against the plaintiff and to which she took no objection. She then said, "I have executed the deed of partition," which no doubt she had, in so far as she authorized Fakir Husen to affix her name to the paper purporting to be the deed of partition of the 11th September 1888 ; but this admission does not help the respondents, more particularly when we find it accompanied by the statement that the deponent had no wish that any change whatever should be made in respect of her property during her lifetime. The statements of Yad Ali and of the plaintiff as to her intentions prior to the execution of the deed are strongly corroborated by the apparently independent and respectable evidence of the witness Dawar Husen, who is related to the plaintiff and has no apparent interest in this controversy either way. I will now examine the evidence which the respondents rely on in defence of the deed. Fakir Husen of course is the leading witness. I have shown how he was interested in the peculiar provision for the defendant, Mu-

hammad Yakub, who had no title to the plaintiff's inheritance under the Muhammadan law. He deposed that the draft of the document was read over to the plaintiff, but there is no evidence of this fact. He said that "since the execution of the document the defendants are in possession of the property," but I believe this statement to be absolutely untrue. He said that "it was the plaintiff's desire that the document should be completed away from her home in Rahmanpur to avoid the opposition of Yad Ali." There is nothing to support and much to contradict this statement. He said that he handed over the document to the plaintiff after he had affixed her name to it, and he implies that it did not again come to his hands till after registration. I believe the statement to be incorrect for reasons which will appear below. And lastly, this witness had to admit that he was taking an active part in conducting and supporting the respondents' case, and that Ata Husen, their leading witness on the issue of possession, was closely related to him by marriage. The remaining witnesses belong to the group directly connected with the execution and registration of the deed. Muhammed Hanif was not present when the deed was signed by the plaintiff. He says that he was subsequently asked to make attestation and did so. He makes the surprising statement that "he had read this deed of gift and had read it over to the plaintiff in a loud voice. All the contents of the deed were admitted by the plaintiff." He gives no reason for this unusual proceeding. His attestation, such as it was, was limited to this, that the plaintiff told him she had previously executed the deed. What then would be the need for or likelihood of this *ex post facto* recitation and admission? This is, I think, the first time in many years that I have heard of a marginal witness of this sort being expected or allowed to read a deed to the executant. The witness was no relation or close friend of the plaintiff. He is a brother-in-law of his co-witness Muhammad Ishaq. He is in no way connected with the defendants or with Fakir Husen, but is in a position to swear that this document "was not executed nor any draft of it made with the advice of Kazi Pir Bakhsh, Shakurul Husen and Fakir Husen." But in this he is directly contradicted by the independent witness Muhammad

1891

MARIAM
BIBI
v
SAKINA.

1891

MARIAM
BIBI
v
SAKINA

Bakar, who "wrote out the deed from the draft brought to him for that purpose by Kazi Pir Bakhsh, Shakurul Husen and Fakir Husen." He had no idea, he says, where and when the document attested was executed. He said that the plaintiff had never taken his advice on any matter except on this occasion, and he adds the significant statement that there was no one in the room during the interview when he was reading the document to her. I do not believe this witness. The next is Muhammad Ishaq. He also was no witness to the execution of the deed. He says:—"the plaintiff asked me to sign, and so I signed. The deed had already her signature before I attested it." He did not read the deed, but, strange to say, the plaintiff told him its provisions. This witness is the brother-in-law of the proceeding witness, and the nephew of Shakurul Husen, son-in-law of the respondent Sakina Bibi. When the witness was asked how he knew that the contents of the deed were in conformity with the executant's wishes he pretended that he read the document after registration and found that it tallied with what the executant had told him. I do not believe this witness. Next in order comes the attesting witness Wazir Khan, a Kanwal or itinerant bard, whom the witness Fakir Husen described as "belonging to a high caste." He professes to know and come into the presence of the plaintiff, which she indignantly denied. He says that he was called into the plaintiff's sitting room and near her bedside he read the deed from beginning to end and then attested it. At this interview also no one but the witness was present. The remaining marginal witnesses were not examined, or at least their evidence has not been brought before us, although one of them was the Akdud Ghafur who professed to identify the plaintiff in the registration of the deed and in the mutation department.

I find it difficult to understand how upon such evidence as this, contrasted with that of the plaintiff, of Yad Ali, and of Dawar Husen, the Court below persuaded itself that the deed was executed with the full knowledge and comprehension of the plaintiff on her part and without fraud or undue advantage of any sort practised on the other side. The rest of the evidence is devoted to showing no

the one hand that the plaintiff never for a day parted with possession of her property, and, on the other, that the defendants after the mutation of names obtained possession of all the property, except such as was in the hands of a mortgagee. It is enough to say on this point that I find the balance of testimony largely in favor of the plaintiff; the few insignificant instances of rent alleged to have been paid to the respondents on the Mirzapur property being evidently manufactured for the purposes of this suit, and not being such, even if they occurred, as to indicate any real or practical possession in defeasance of the plaintiff's possession. I will now only notice briefly the reasons which influenced the Court below. The learned Subordinate Judge made a point against the plaintiff out of the 4th paragraph of her plaint in which she, a *Sunni* professed an intention of providing a *wakf* for "*Imambara* and *Majlis* in honor of the two Imams," whereas such a dedication of property would be made by a *Shia* Muhammadan only, but the Subordinate Judge himself had noticed that the intention of the plaintiff, as described in her own evidence and in that of her witnesses, was to build a mosque, which it appears was in course of erection during the trial of the suit below, while the development about the *Imambara* and *Majlis* appears for the first time in the plaint. I think it is more fair to judge the plaintiff by her proved wishes in August-September 1888, than by the coloring they received in her plaint in February 1889, which was drawn up by her *Shia* friend and karinda, Yad Ali. However this may be, the deed would remain equally divergent from her expressed wishes, whether they referred to a mosque only or to *Imambara* and *Majlis* purposes also. The Court below was wrong in finding that the registration endorsement on the deed shows that the contents were read out the executant. On the contrary, it shows that the contents, of s. 82 Act III of 1877, were explained to the executant, which is a very different thing. It is not evident, as the Court below said, "from the testimony of Muhammad Hanif, Muhammad Ishaq and Fakir Husen that the contents of the deed were read out to plaintiff and the purport of the deed was also explained to her. As I pointed out above, Fakir Husen did not prove that the

1891

M. ARIAM
BIBI
v.
SAKINA.

1891

MARIAM
BIBI
v.
SARINA.

contents were read out to the executant. I explained why I disbelieve that Muhammad Hanif or Muhammad Ishaq read the paper at all, and no witness pretended that he or any one else explained the deed to the plaintiff. The learned Subordinate Judge's remark "that the plaintiff's object would have been frustrated if she had embodied it in a will instead of a deed of gift, because a will operates as regards one-third only of the property," is misleading, because he overlooks the limitation to the rule in the case of consent of heirs. The Court below derived a further presumption against the plaintiff from the fact that "she remained silent for a long time after she had come to know that the deed had been executed contrary to her wishes." But she did not do so. Some time in October, probably early in the month, Yad Ali got a hint of the facts of the case and told his employer, who took the promptest action possible in the matter by at once ejecting Sakina and her family from her house and society. She did not do this immediately on her return from Sheikhpur to her home, as the Court below thought, but some time afterwards when her suspicions were roused as to the honesty of the transaction.

It is needless to consider the rest of the judgment upon the legal aspect of the sort of possession requisite to make a gift good under the Muhammadan law, as I am satisfied that possession did not pass at all. For the reasons which I have stated above I hold that the plaintiff should have got a decree, not only on the sufficient ground that she had been led into his deed disposing of her property under suspicious circumstances and without independent advice, but also because she has in my opinion furnished good reasons for holding that she was deceived into putting her name to that deed under the impression that its contents were substantially different from what in fact they are. Allowing the appeal I would reverse the decree of the Court below and decree the appellant's claim with costs of both the Courts.

STRAIGHT, J.—I entirely concur in the judgment of my brother Tyrrell.

Appeal decreed.

Before Mr. Justice Mahmood.

SABRI (PLAINTIFF) v. GANESHI (DEFENDANT).*

1891
June 20.

Civil Procedure Code, s. 566—Remand—Court to which remand is made not competent to delegate its functions in respect of such remand.

When a case is remanded under s. 566 of the Code of Civil Procedure to the lower appellate Court for finding on certain issues, it is not competent to that Court to delegate the decision of those issues to a Court subordinate thereto.

The facts of this case are as follows :—

One Hira Lal died in 1881 leaving surviving him a widow, Musammat Darbo, two daughters, Musammat Sabri and Musammat Ganeshi, and a daughter-in-law, Musammat Kuar, widow of a deceased son. On his death his widow, Musammat Darbo, got possession of his property and her name was entered against it on the Revenue records. Musammat Darbo died in 1885, and Musammat Kuar was then put into possession of the property. Musammat Kuar sold the property on the 23rd December 1887 to one Rukha. Thereupon Musammat Sabri sued her and her vendee to set aside the sale of the 23rd December 1887, and to get possession of the property. In this suit she succeeded, and obtained possession. On the 10th January 1889 Musammat Ganeshi brought this present suit against Musammat Sabri, claiming exclusive possession of the property in question on the ground that she was indigent and unprovided for, while her sister, the defendant, Musammat Sabri, was in good circumstances. The Court of first instance and the lower appellate Court both agreed in holding that the plaintiff was entitled to succeed. The defendant then appealed to the High Court. The appeal came before Mahmood, J., who, on the 25th February 1891, remanded issues as to the respective means of the plaintiff and the defendant for determination by the lower appellate Court. The subsequent facts sufficiently appear from the judgment of Mahmood, J.

Mr. W. M. Colvin and Pandit Moti Lal, for the appellant.

Mr. Amir-ud-din and Munshi Sukh Ram, for the respondent.

*Second Appeal No. 1092 of 1889 from a decree of Babu Mata Prasad, Subordinate Judge of Saharanpur, dated the 23th June 1889, confirming a decree of Maulvi Iziat Rai, Munsif of Saharanpur, dated the 4th March 1889.

1891

SABRI
v.
GANESHI.

MAHMOOD, J.—For the reasons stated in my order of the 25th February 1891, this case was remanded under s. 566 of the Code of Civil Procedure to the lower appellate Court for clear findings upon certain issues therein mentioned.

The learned Subordinate Judge of Saharanpur, as the Judge of lower appellate Court, by his *rubkar* of the 13th March 1891 delegated the trial of the remanded issues to the Munsif of Muzaffarnagar with the consent of both the parties.

The Munsif accordingly tried the issues and recorded findings in his proceedings, dated the 28th March 1891. Upon the issues he came to the following conclusions :—

“Both the sisters are, in my view of the evidence, possessed of scanty subsistence, both are unprovided for, and both indigent.”

These findings of the Munsif appear to have been sent back to the Subordinate Judge, who, on the 9th April 1881, fixed the 13th of that month to hear parties on such findings.

Accordingly on the 13th April 1891 the findings if the Munsif coming on for decision before the Subordinate Judge, that officer contented himself by simply expressing the view that he concurred in the opinion of the Munsif as to the findings recorded in the proceeding, dated the 28th March 1891, and referred to above.

The findings of the Munsif were thus adopted by the Subordinate Judge, and it appears that the pleaders for neither party raised any objection to such a course.

Thereupon the Subordinate Judge, accepting the findings of the Munsif, has returned those findings to this Court, as if they were the findings of his Court, as the Court of First Appeal, to which the case had been remanded for determination of certain points of fact under s. 566 of the Code of Civil Procedure.

In am of opinion that the procedure of the learned Subordinate Judge was entirely erroneous, that the order of this Court of the 25th February 1891, directed as it was to the lower appellate Court was to be carried out by that Court, and that the learned Subordi-

nate Judge in delegating his functions to the Munsif by his order, dated the 13th March 1891, acted *ultra vires* and without jurisdiction.

1891
SABRI
v.
GANESHI.

I am further of opinion that the findings of the Munsif recorded in his proceeding, dated the 28th March 1891, did not satisfy the requirement of this Court's order of remand, dated the 25th February 1891.

As has already been observed, the Subordinate Judge acted without jurisdiction and the whole proceeding is illegal and *ultra vires*.

Under these circumstances, following the uniform practice and rulings of this Court, I am constrained to hold that there are no findings such as would satisfy the remand order of the 25th February 1891, and it is my duty to remand the case again to the learned Subordinate Judge for clear findings upon issues mentioned in my order of the 25th February 1891, with reference to the observation I have made.

I order accordingly. Upon receipt of the findings ten days will be allowed to the parties for objections.

Cause remanded.

APPELLATE CRIMINAL.

Before Mr. Justice Straight.

QUEEN-EMPRESS v. HUGHES.

1891
August 1.

Jury, misdirection of—What amounts to misdirection—Act XLV of 1860, ss. 361, 366.

In a trial with a jury under s. 366 of the Indian Penal Code the Judge on the question of intent charged the jury in the following words:—"It remains only to consider the question of intent. The charge was that the girl was kidnapped in order that she might be forced or seduced to illicit intercourse. As to this, it is sufficient to say that no other inference is possible under circumstances. When a man carries off a young girl at night from her father's house the presumption is that he did so with the intent indicated above. It would be open to him, if he had admitted the kidnapping to prove that he had some other object, but no other object is apparent on the face of the facts."

1891

QUEEN-
EMPRESS

v.

HUGHES.

Held, that this amounted to a misdirection of the jury. The question of intent was a pure question of fact, but the way in which it had been put to the jury left them no option but to adopt the view taken by the Judge.

The facts of this case sufficiently appear from the judgment of Straight, J.

Babu *Parbati Charan Cha'arji* for the appellant.

The Government pleader, *Munshi Ram Parsad*, and Mr. *J. Simeon*, for the Crown.

STRAIGHT, J.—In this case John Michael Hughes was tried in the Sessions Court before the Sessions Judge and a jury for the offence of kidnapping one Claudia Caleb, the daughter of John James Caleb, a girl aged 13 years and 7 months, from the keeping of her lawful guardian, with the intent that she might be compelled, or in order that she might be forced or seduced, to illicit intercourse. Along with Hughes was tried a man of the name of David Baptist, who was charged with the abetment of the above offence. The last mentioned person was acquitted, but Hughes was convicted and sentenced to a period of seven years' rigorous imprisonment. It has been objected here on appeal that upon the question of intent the learned Judge misdirected the jury in such a way as to cause prejudice to the accused, Hughes, and upon that ground I am invited to set aside the proceedings and direct a new trial.

Now the offence provided for by s. 366 of the Penal Code involves two ingredients. First, there must be kidnapping or abduction, as defined in ss. 361 and 362, and next, the act of kidnapping or abduction must be done with either an intent or a knowledge, or with the object, that certain things may happen which are mentioned within the four corners of s. 366. In the present case the intent charged was as I have already indicated, and it is in reference to the learned Judge's remarks upon that head that I am invited to intervene. Now I should be the last person to be too technical as to the language used by a learned Judge in charging a jury. At the same time it is essential, so long as this latter institution has allocated to it in certain cases the duty of determining questions of facts, to draw a very broad line between what the duty of a Judge

is and what the duty of a jury is, and to see that the Judge has not intruded himself and his views into the province of the jury in such a way as to lead them to form an opinion expressed by him that that is the only opinion which could be arrived at from the evidence. In other words, in this case, for example, it was competent for the learned Judge to recapitulate the evidence which bore upon the question of intent, and to express for the guidance of the jury what seemed to be the reasonable and rational conclusion to be drawn from that evidence. But I have read the learned Judge's remarks in this case. It does not appear to me that he left the jury any alternative, and practically what he told them was that upon the evidence there was only one conclusion they could arrive at, namely, that the intent charged was proved. It seems to me that that is going beyond the duty that a Judge has to discharge. The question of intent was a pure question of fact, and the mischief that has followed is this that, having very carefully examined all the evidence in this case, I doubt if there was any satisfactory or proper proof from which the jury were entitled to draw the inference that the learned Judge told them they were bound to draw. His remarks were these:—"It remains only to consider the question of intent. The charge was that the girl was kidnapped in order that she might be forced or seduced to illicit intercourse. As to this, it is sufficient to say that no other inference is possible under the circumstances. When a man carries off a young girl at night from her father's house the presumption is that he did so with the intent indicated above. It would be open to him, if he had admitted the kidnapping, to prove that he had some other object, but no other object is apparent in the face of the facts." I differ from the learned Judge. I think that upon the facts of this case there was much more reasonable ground for the inference that this man had kidnapped this girl for the purpose of going to the father and insulting him by telling him that he had taken his daughter away and that he might do his worst. There is not a particle of proof that any indecent words were spoken by this man either before or at the time he kidnapped the girl, and it is a striking circumstance that after he had sent her away in an ekka to the Christian village, Beli, he then

1891

QUEEN-
EMPRESS
v.
HUGHES.

1891

QUEEN-
EMPRESS
v.
HUGHES.

himself went into the father's house and told him in specific terms what he had done, whereupon he was seized by the father and handed over to a police constable. Another circumstance is that neither at the time of kidnapping nor subsequently was there the slightest act of indecency practised, or a single word spoken, and in the result the girl was only absent for a period of about two hours. It is perfectly clear upon the evidence in this case that there was extremely bad feeling between the prosecutor on the one hand and this young man on the other. The appellant had undoubtedly made himself most obnoxious and offensive to Mr. Caleb, who had had on many occasions to remonstrate with him for his conduct. I have no doubt that he is one of those ill-conditioned persons, who dislike remonstrance or advice, or warnings at the hands of persons in the position of Mr. Caleb, the pastor of the Church to which he belonged. Mr. Caleb's remonstrances with him had very much aggravated him and he was determined to resent them by doing something which was most degrading and insulting to Mr. Caleb. But that falls very far short of supplying that adequate and very satisfactory proof from which a jury would be entitled to draw the very serious inference that is required for the purpose of proving the intent, knowledge, or object contemplated by s. 366. I think myself the terms of the learned Judge's judgment did amount to a misdirection to the jury. I further think that that misdirection did prejudice the accused, and, therefore the only question which remains is, are the circumstances such as to constrain me to order a new trial? I have pointed out that the offence under s. 366. of the Indian Penal Code involves, first of all, the offence of kidnapping. Putting aside a great deal of irrelevant matter that appears in this record, I am satisfied that the jury were right in holding that this man did kidnap this girl, the object being that which I have indicated, namely, to put the father in great distress of mind and to put a slur and degradation upon him and subject him to a grave public insult. I think, therefore, I am entitled to hold, as the Judge might have left for the jury to find, had he thought proper to do so, that, although the intent is not proved as required by s. 366, nevertheless the simple offence of kidnapping

is proved, and it would have been competent for the learned Judge to have told the jury in this case that, assuming that they were not satisfied as to the proof of intent, they might convict the accused of the lesser offence under s. 361. I therefore shall deal with this case as if that direction had been given to the jury, and I shall treat the verdict, to the extent that it finds kidnapping against the accused, as a good verdict. I then have to consider whether the sentence should be allowed to stand, or whether I should disturb it. I regret to say that I find upon this record some evidence that never ought to have been admitted as to the character of the prisoner. The prisoner himself never put his character in issue, but, despite that, a witness was allowed to be examined as to his being a bad and dissolute character. It cannot be too distinctly understood, and I cannot say too emphatically that where a man is being tried upon a specific charge, unless within the four corners of the law proof of a previous conviction is allowed for the purposes of proving guilty knowledge, or whatever it might be, no question ought to be sanctioned and no evidence ought to be allowed to show generally that he is a man of bad and dishonest character. That is forbidden by law; but if an accused at his trial chooses to put in issue the question of his good character it is then competent to rebut that evidence by giving evidence of general evil reputation. The learned Judge explains the sentence that he passed upon this man upon the ground that he was generally a person of bad or dissolute character. We have nothing upon this record except the general statement of a witness who gives no details or particulars to prove this. We do not know in what direction his character is bad or dissolute, and I myself wholly object to a Judge allowing his mind to be influenced by any vague statements of that kind. If the man had been charged with and convicted of a criminal offence such as rape, it may be that the Judge might have allowed proof of this to be given. But there is no such allegation here. At the same time it is quite plain to my mind from the action of this man in this case that he is a very audacious and daring person, who deliberately sought to put a grave affront and indignity upon the pastor of his Church, because that pastor had remonstrated with him as to his behaviour,

1891

QUEEN-
EMPRESS
v.
HUGHES.

1891
 QUEEN-
 EMPRESS
 v.
 HUGHES.

and had found fault with him for his conduct generally. I have considered this matter very carefully and I have come to the conclusion that the proper measure of punishment is that he be rigorously imprisoned for a term of two years and six months. I think it right to add that I see no reason to doubt the truth of Mr. Caleb's statement in the main. In one or two matters there may be discrepancies, but they are only slight. It does not seem to me that there is the slightest foundation for the suggestion that he had lent himself to a false case for the purpose of punishing the appellant.

REVISIONAL CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Tyrrell.

1891
 August 1.

CHEDA LAL (PLAINTIFF) v. MULCHAND (DEFENDANT).

MINDAI (JUDGMENT-DEBTOR) v. KUNDAN SINGH (DECREE-HOLDER).*

Attachment—Small Cause Court—Standing crops—Immovable property—Act I of 1868 (General Clauses Act)—Civil Procedure Code—Act IX of 1887 (Small Cause Courts Act) sch. ii, cl. (6).

Standing crops are immovable property in the sense of the General Clauses Act (I of 1868), and of cl. (6) of the second schedule of the Small Cause Courts Act (Act IX of 1887), and of the Civil Procedure Code. *Mudayya v. Yenkata* approved (1).

This was a reference under s. 617 of the Code of Civil Procedure made by the Munsif of Bareilly, sitting as a Small Cause Court Judge, in the following terms :—

Suit No. 79 of 1891. Miscellaneous No. 160 of 1891.

CHEDA LAL.—Plaintiff, MINDAI—Judgment-debtor,

versus

versus

MULCHAND.—Defendant. KUNDAN SINGH—Decree-holder.

“These are two cases of different nature, but the points at issue, on which I entertain some doubt, are common to both. They have therefore been taken up together for the purposes of this reference, which I beg leave to make to the Honorable the High Court under the provisions of s. 617 of Act XIV of 1882.

* Reference under s. 617 of the Civil Procedure Code.

(1) I. L. R., 11 Mad., 193.

“The suit No. 79 is for the recovery of Rs. 36-2-6 due under a bond by enforcement of lien on the hypothecated sugarcane crops, which are still standing in the fields. The defence, *inter alia*, is that the standing crops are immovable property and that a Court of Small Causes is not competent to try a suit for enforcement of lien in respect of the same.

1891

CHEDA LAL

v.

MULCHAND.

“The miscellaneous case No. 160 contains an objection on behalf of a judgment-debtor as to the propriety of attachment and sale of certain standing crops, such as wheat, barley, &c., which were effected under the provisions of s. 269 of Act XIV of 1882 in the execution of a decree by order of this Court, on the Small Cause Court Side. The judgment-debtor urges that the procedure laid down in ss. 274, 287 and 289 *ibid* should have been followed, as the growing crops are immovable property, and that the Small Cause Court had no jurisdiction to proceed against the same under s. 269. The points for determination are :—

1. Whether the standing crops are movable or immovable property for the purposes of the Small Cause Court and the Code of Civil Procedure?

2. Can such a Court pass a decree for enforcement of lien against them?

3. Can it make a valid attachment and sale of the same in execution of its decree?

“A reference was formerly made by the Small Cause Court Judge of Agra asking for the opinion of the High Court as to whether trees and growing crops could be attached and sold in execution of a decree as movable property by a Small Cause Court. The Honorable Court therefore gave a decision as regards the trees, but expressed no opinion in respect of the standing crops. See *Umed Ram v. Daulat Ram* (1). It was there held that trees were immovable property within the definition given in cl. (5) of s. 2 of Act I of 1868, and, as such, were not liable to sale or attachment by a Court of Small Causes under Act XI of 1865, notwithstanding that

1891 they were classed as movable property in the later Acts III of 1877 and IV of 1882.

CHEDA LAL
v.

MULCHAND.

"A somewhat similar question relating to the standing sugar-cane crops was again raised in the Honorable Court in *Kalka Prasad v. Chandan Singh* (1), but the points there discussed and decided were not exactly like those involved in the present cases. It appears to have been ruled there (see pp. 21-23) that, although the standing crops were movable property not only under Act III of 1877 and IV of 1882, but also under cl. (6) of s. 2 of Act I of 1868, yet a suit for enforcement of lien against such crops was not cognizable by a Court of Small Causes under Act XI of 1865 with reference to a previous ruling in *re Surajpal Singh v. Jairam Gir* (2); which laid down that such Court was incompetent to entertain any suit for enforcement of lien against any movable property whatever.

"The Act XI of 1865 has since been repealed. Under art (6) of sch. ii of Act IX of 1887 the jurisdiction of the Small Cause Court is excluded from trying suits for enforcement of lien as regards immovable property only. Such Court now appears to be competent to dispose of suits for enforcement of lien against movable property. The precedent in *re Surajpal v. Jairamgir*, which was based upon the repealed Act does not appear to be in force any longer. The effect of the ruling in *re Kalka Prasad v. Chandan Singh* would therefore be that a Court of Small Causes under Act IX of 1887 can try suits for enforcement of lien against standing crops and can attach the same in execution of its decree, treating them as movable property.

"In my humble opinion the case of a tree is distinguishable from that of standing crops. A tree is generally planted with the intention of being kept and preserved for ever, though it may be cut off and removed at pleasure. The case of a tree resembles in all respects that of a house which may likewise be demolished at one's will. Both are equally permanently fastened to the earth and therefore fall equally within the definition of immovable property under clause (5) of s. 2 of Act I of 1868. Standing crops are

never cultivated with the intention of being kept permanently, but they are intended from the very beginning to be reaped after a few months. Their case, and particularly grain crops when they are in ear, resembles that of fruit on trees, and, as such, they are movable property. It has been ruled that fruits, even when they are attached to trees which are permanently fastened to the earth are movable property and suits relating to them are cognizable in a Small Cause Court [*Nasir Khan v. Karamat Khan* (1)]. It is true that by a wide interpretation of clauses 5 and 6 of s. 2 of Act I of 1868 everything attached to the earth, whether permanently or temporarily, is immovable property, so long as it is not severed from the earth, but, by a qualified and reasonable construction of these clauses with reference to the natural and ordinary course of affairs, the things which are really movable shall not be classed with the immovable property simply because they are partially attached to the earth. If the definition given in clause 5 be strictly construed, every movable thing, such as utensils, furniture, clothes, &c., would become immovable property, if a portion of the same is sunk under the ground. In that case nothing will ever be attachable in execution of a Small Cause Court decree, as the judgment-debtors, after being aware of this interpretation, would make everything of their household as immovable property as soon as they receive intimation of the issue of writ of attachment. I would therefore find the issues under reference against the defendant and the judgment-debtor.

“There is, however, a recent ruling of the Madras High Court in their favor [*Madayya v. Yenkata* (2)]. There the issues now-raised were directly discussed and decided after referring to the Allahabad cases *in re Nasir Khan v. Karamat Khan* (1) and *Umed Ram v. Daulat Ram* (3) above alluded to, and after considering two other cases *Pandah Gazi v. Jennuddi* (5) and *Sadu v. Sambhu* (4) but without any reference to the ruling in *re Kalka Prasad v. Chandan Singh* (5) which apparently enunciates a conflicting view.

(1) I. L. R., All., 168.

(3) I. L. R., 5 All., 564.

(2) I. L. R., 11 Mad., 193.

(4) I. L. R., 4 Calc., 665

(5) I. L. R., 6 Bom., 592.

1891
 CHEDA LAL
 v.
 MULCHAND.

As the matter is of some importance and daily occurrence, I consider it desirable to solicit a clear decision of our own High Court thereon for my present and future guidance.

“It will not be out of place perhaps to mention that according to the practice that prevails in this Court from several years past, standing crops are invariably treated as movable property for the purposes of attachment and sale. I believe such is the practice in many other Courts of these Provinces. In regarding them as immovable property both parties will often be put to great inconvenience and loss in their attachment and sale, as was pointed out in detail by the referring officer in the Madras case. In many instances all steps taken under ss. 274, 287 and 289 of Act XIV of 1882, all delays occurring between the dates of attachment and sale and all expenses incurred for an inquiry under the High Court's Circular Order No. 4 of 1881, for the issue of sale proclamations, and for the care and custody of the crops since attachment will become useless when they are ripe enough and reaped long after the attachment, but a few days before the date fixed for sale; because after they have been severed from the ground they will have to be sold as movable property. It will be a mere technical procedure and also an anomaly to treat the crops immovable property so long as they are standing in the fields and afterwards as movable property in the course of the same execution proceeding.”

The reference came before Edge, C. J., and Tyrrell, J., who gave the following opinion thereon :—

EDGE, C. J., and TYRRELL, J.—Our answer to this reference is that we agree with the opinion expressed by the High Court at Madras in *Madayya v. Yenkata* (1), and we hold that standing crops are immovable property in the sense of the General Clauses Act (I of 1868) and of clause (6) of the second schedule of Act IX of 1887 and of the Code of Civil Procedure.

Return the papers.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Mahmood.

JAWLA DEI (PETITIONER) v. PIRBHU (OPPOSITE PARTY) *

1891

August 4

Guardian and ward—Guardian ad litem How long appointment of guardian ad litem remains in force—Change of guardian on application of ward—Act VIII of 1890 (Guardian and Wards Act), s. 10.

Where a guardian *ad litem* has once been appointed, his appointment enures for the whole of the *lis* in the course of which it has been made, unless and until it is revoked by the Court; but if the person to whom such guardian is appointed prays for his removal and for the substitution of a guardian named by the applicant, the Court will appoint the guardian so named in absence of any special and valid objection to such person.

A Hindu boy named Pirbhu or Rabi Shankar, aged about 15 or 16 years, having become a convert to Christianity, his adoptive mother, Musammat Jwala Dei, applied to the District Judge under s. 10 of Act VIII of 1890, to be constituted his legal guardian. The application was resisted on behalf of the minor and was ultimately refused by the District Judge. Musammat Jwala Dei then appealed to the High Court, the minor being represented by his guardian *ad litem* in the lower Court, the Rev. J. M. Alexander. In the High Court, however, the minor completely changed his attitude and expressed his readiness to go to his adoptive mother, Musammat Jwala Dei, and to accept her as his guardian.

Pandit *Ajudhia Nuth* and Kuar *Parmanand*, for the appellant.

Mr. C. Ross *Alston*, for the Rev. J. M. Alexander as guardian *ad litem* to the respondent.

STRAIGHT, J.—This is an appeal from an order of the District Judge of Allahabad, dated the 16th December 1890. The matter before him originated in an application preferred under the Guardian and Wards Act of 1890. The mother of one Rabi Shankar, a minor, being the applicant, she prayed that she might be declared by order of the Court the guardian of the person of such minor son. At the time that application was filed the minor appears to have been under the religious influence of the Rev. Mr. Alexander, and was

* First appeal No. 13 of 1891 from an order of F. E. Elliot, Esq., District Judge of Allahabad, dated the 16th December 1890.

1891
 JWALA DEI
 v.
 PIERRE.

in the custody and control of some other persons. For the purposes of the proceedings before the District Judge, Mr. Alexander was appointed guardian *ad litem*, and that proceeding was contested, and in the result the learned Judge refused to make any order to appoint the applicant guardian. It is wholly unnecessary for the purposes of this judgment to enter at length into the reasons given by the learned Judge. It is enough to say that he found that Rabi Shankar was a minor, and further that he had attained a knowledge and discretion which entitled him to judge for himself; that he was well able to take care of himself, and that it was unnecessary to appoint a guardian. From that decision of the District Judge an appeal was preferred to this Court by Musammât Jwala Dei, the mother of the minor, and it originally came before my brother Mahmood in Single Bench, and he, being of opinion upon the points raised that it might become necessary to re-consider the ruling of himself and myself in *Sarat Chandra Chakrabarti v. Forman* (I. L. R., 12 All. 213), thought it well to guard against such a contingency by requesting that I should be associated with him to form a Division Bench to hear the appeal. It has now become unnecessary to enter into the matter at large. In the proceedings before the District Judge the minor took up and occupied through his guardian *ad litem* a hostile and antagonistic position to his mother, but since those proceedings closed, he has wholly altered his attitude, and, according to the terms of a petition filed by him on the 21st March last, which he has in Court before me admitted to have signed and presented to this Court, declared his wish that his mother should be appointed his guardian and that he should remain under her custody and control, to which, he further states, he has now returned.

Mr. Alston has been instructed to appear for Rev. Mr. Alexander, the guardian *ad litem*. Some question at first arose as to whether he could properly be regarded as a party to the present appeal Mr. Alston's contention at first being that the appointment of guardian in a proceeding of this sort in the Court below only enures for the term of the proceeding in that Court.

I am strongly indisposed to adopt that view, and indeed the learned counsel himself has very fairly and properly resiled from that position, and is now prepared to admit that his client is the respondent in this appeal as the guardian *ad litem* of the minor. But I should like to add this, that where a person is appointed as the guardian of a minor for the purposes of a *lis*, that means of such *lis* in all its ramifications, and so long as it subsists, whether in the Court of first instance or in the Court of appeal, unless he takes the necessary steps to have himself discharged from that position which has been put upon him by the Court. If any other view were to be entertained not only the gravest inconvenience will be caused, but the interest of the minor might be very seriously imperilled and prejudiced. Consequently we have, in my opinion, before us a properly constituted appeal *qua* the array of appellant and respondent. Therefore, Mr. *Alston* appearing for the Rev. Mr. Alexander, the guardian *ad litem*, properly represents the interests of the minor Rabi Shankar. He does not contest or question the propriety of this appeal, and, as he very properly observed, it would be absurd for him to do so, in view of the deliberately expressed wish of the minor, recorded and registered in his petition filed in this Court of his desire and wish that his mother should be his guardian and should have the custody and control of his person. Moreover, in a proceeding of this kind a Court having to deal with it would, in my opinion, be bound by the wish expressed by a minor, unless it saw that the guardian he asked to be appointed was an undesirable and unsuitable person, to give effect to that wish and to invest with power the person he wished to be his guardian. This appeal therefore succeeds and the order of the learned Judge must be set aside, and I direct that the order do pass declaring that Musammat Jwala Dei is the guardian of the person Pirhhu *alias* Rabi Shankar, her minor son, and that she be invested with all the powers under the Act that appertain and belong to a person of that kind. The parties will pay their own costs in all the Courts.

1891
JWALA DEI
v.
PIRBHU.

MAHMOOD, J.—I am entirely of the same opinion as my brother Straight, but since he has been good enough to consent to sit with me

1819
JWALA DEVI
v.
PIRBHU.

in this case in consequence of my order of the 20th April 1891, I only wish to add that when the case was before me in the Single Bench upon that day, there appears to have been some confusion in the argument on behalf of the petitioner when it assailed the concurrent ruling of my brother Straight and myself in *Sarat Chandra Chakrabati v. Forman* (1). That was an application under a totally different statute to the one in this case, namely, the application here appears to be such as is contemplated by Chapter II of Act VIII of 1890. I may say therefore, that, the ruling to which I have referred has no application to this case. If it had, it would be a matter for serious consideration for me, so far as I am concerned, to alter the view and the rule of law which was laid down in that case. There are some circumstances in this case which amply go to indicate that it has no relation to questions of custody in the sense which Act IX of 1861 would involve. As a matter of fact, there is no such question, and as my brother Straight has said enough to show that, at any rate, the ruling in *Sarat Chandra Chakrabati v. Forman* (1) is not one which applies here, I agree also in the decree which my brother has made.

APPELLATE CRIMINAL.

Before Mr. Justice Straight.

QUEEN-EMPRESS v. NIDDA.

1891
August 5. Attempt to commit murder—Facts necessary to constitute such attempt—Act XLV of 1860, ss. 299, 300, 307, 511.

Section 511 of the Indian Penal Code does not apply to attempts to commit murder which are fully and exclusively provided for by s. 307 of the said Act.

A person is criminally responsible for an attempt to commit murder when, with the intention or knowledge requisite to its commission, he has done the last proximate act necessary to constitute the completed offence, and when the completion of the offence is only prevented by some cause independent of his volition.

The facts of this case sufficiently appear from the judgment of Straight, J.

Mr. *C. Ross Alston* (at the request of the Court), for the appellant.

The Government Pleader, *Munshi Ram Prosad*, for the Crown.

1891

QUEEN-
EMPRESS
v.
NIDDHA.

STRAIGHT, J.—This is an appeal from a judgment and sentence of the learned Judge of Agra, dated the 10th January 1891, under the following circumstances. Ram Lal and Niddha, Chamár, were absconding criminals against whom a warrant had been granted for their arrest upon a charge of dacoity. On the 8th November 1890, certain chaukidárs having received information of the whereabouts of these persons went to a field accompanied by some other persons for the purpose of taking them into custody. The following facts are found by the learned Judge, and they are amply proved by the evidence. He says :—“As soon as Ram Lal and Niddha perceived the men advancing they jumped up, and Ram Lal fired a gun straight at them. This missed. Niddha then brought up a sort of blunderbuss he was carrying, a sort of half carbine, half horse-pistol with a bell-mouth, known as a karabin, to the hip and pulled the trigger. The witnesses swear that the cap exploded but the charge did not go off.” Thereupon, after some struggle into which I need not go, Niddha was arrested and was subsequently tried for attempted murder. It is in regard to that trial that this appeal has arisen, and it will be convenient to set out fully what the learned Judge had to say with regard to the legal aspects of the evidence against Niddha. He remarks :—“As to Niddha, the point is raised that even conceding the facts to be correctly stated, they cannot amount to attempted murder under s. 307, Indian Penal Code. * * * * As to Niddha, the question is, did he, by pulling the trigger of a gun or pistol which he knew to be loaded, commit an offence which amounts to an attempt to murder ? The witnesses swear that the hammer fell and there was a distinct detonation of the cap. It is proved that the karabin was loaded when captured. No cap was found, but the hammer fitted very imperfectly on the nipple, and in the scuffle the exploded cap might easily have been knocked off. There is a case in the Bombay High Court Reports, Vol. IV, p. 17, Crown Cases, (*Regina v. Francis*

1891

QUEEN-
EMPERESS
v.
NIDDHA.

Cassidy), in which it was held that in order to constitute the offence of attempt to murder under s. 307, Indian Penal Code, the act committed by the prisoner must be an act capable of causing death in the natural and ordinary course of events. In that case, Francis Cassidy presented an uncapped rifle, believing it to be capped, at the Drum Major of his corps, but was prevented from pulling the trigger. The Court held that he could not be convicted under s. 307, Indian Penal Code, but that a conviction would hold good under s. 511 read with ss. 299 and 300 of the Indian Penal Code. In this case I have no doubt that the accused Niddha pulled the trigger knowing the gun to be loaded and intending it to go off. There is doubt as to whether it was capped, as the cap was not found, and the snap of the hammer on the nipple might be mistaken for a detonation. The Court concurs with the assessors, who find that the accused Niddha fired, or rather tried to fire, the carbine with intent to cause death or grievous hurt, but, altering the section from s. 307, Indian Penal Code, to s. 511 read with ss. 299 and 300 directs that Niddha be rigorously imprisoned for five years."

When this appeal came before me and I had looked into the case of *Cassidy*, I asked Mr. *Alston* to argue it on behalf of the appellant, who was unrepresented, and on a subsequent date I had the great advantage of hearing an admirable discussion of the points involved on both sides and have now taken time to consider what view I ought to adopt.

Although in one aspect the case of *Queen v. Cassidy* (1) does not necessarily interfere with the conclusions upon the merits at which I have arrived in this case, in another it is necessary for me to consider whether, having regard to the language of the Indian Penal Code, it is competent for me, as the learned Judges who decided that case held it was competent for them, to convict of attempted murder upon s. 511 taken in connection with ss. 299 and 300 of the Indian Penal Code. It will be convenient to consider that portion of the judgments of the Bombay Court which deals with that

(1) 4 Bom. H. C. Rep. 17.

matter first. I am of opinion that s. 307, Indian Penal Code, is exhaustive and that within the four corners of that section are to be found the whole provisions of the law relating to attempts to murder. I am led to this conclusion by an examination of the terms of s. 511, Indian Penal Code. They are follows :—

1891

 QUEEN-
EMPERESS
v.
NIDDEHA.

“Whoever attempts to commit an offence punishable by this Code with transportation or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence.” Now it appears to me that the attempts which are limited by s. 511 are attempts to commit offences, which by the Code itself are punishable either with “transportation or imprisonment.” It cannot properly be said that the offence of under is punishable with either of those things. In my opinion, if murder, as mentioned in ss. 299 and 300, was intended to be included, the Legislature would before the word transportation have inserted the word “death.” But, again, the section goes on and says that, certain things being done, the person who does those acts shall, “where no express provision is made for the punishment of such attempt,” be punished in a particular way. As I have pointed out, by s. 307, Indian Penal Code, there is express provision made in the Code itself for the punishment of an attempt to murder. It seems therefore to me that when the framers of s. 511 drew it up in the terms that they have drawn it up, they especially meant to exclude those attempts to commit offences which in the various preceding sections of the Code were specifically and deliberately provided for with punishments enacted in the sections themselves. I have therefore for these reasons come to the conclusion that s. 307 is exhaustive and that no Court has any right to resort to the provisions of ss. 299 and 300 read with s. 511 for the purpose of convicting a person of the offence of attempted murder, which, according to the view of the Court, does not come within the provision of s. 307, Indian Penal Code. I need only add that the maxim *expressio unius &c., &c.*, should be applied in construing a penal statute of this kind, and, apart from that, it is obvious that any other view would introduce the greatest possible inconvenience and a vast

1891

QUEEN-
EMPRESSv.
NIDDAH.

conflict of opinion as to what would constitute an attempt to commit murder within the meaning of the Penal Code.

So far, therefore, I am constrained to say that I differ with the view expressed by the learned Judges in the case of *Queen v. Cassidy* (1). But I have before remarked upon the facts as disclosed in that case, and in this case I do not think that the view of the learned Judges formed on those facts would in any way preclude me from adopting the view that I am about to take in this case, *viz.*, that there was a good attempt to commit murder within the meaning of s. 307, Indian Penal Code. In the case of *Cassidy* the man presented an uncapped gun at another, he believing it to be capped. He never pulled the trigger, because he was prevented from doing so, and in reference to what I am about to say as to the facts of this case and the view I take of the law bearing upon it, I do not feel called upon to say, one way or the other, whether upon those facts there was a sufficient attempt. But in the present case the matter is wholly different. The appellant was an absconding criminal in the company of another absconding criminal. It is obvious, upon the evidence and the finding of the learned Judge, that he was determined in conjunction with that person to resist his lawful apprehension, and that for the purpose of doing so he was armed with a loaded blunderbuss, and that in the direction of the persons who were seeking to arrest him, he presented the weapon, pulled the trigger, the hammer fell on the nipple, and it was only owing to the circumstance that the cap did not explode, that the gun failed to go off and consequently no harm was done.

Now the difficulty is made in the Bombay case to which I have referred by the words of s. 307 which say :—" whoever does any act with such intention or knowledge and under such circumstances that if he by that act caused death he would be guilty of murder." The learned Judges of Bombay lay very great stress upon the words "under such circumstances." With the utmost respect for them, I think they have attached too much importance to those words. The words "under such circumstances" have in my opinion no other

meaning than this, that the act must be done in such a way and with such ingredients that if it succeeded, and death was caused by it, the legal result would be murder according to ss. 299 and 300. The same words are used in the section dealing with the attempt to commit culpable homicide, and I cannot read them as requiring me to go the length of Sir Richard Couch in the second paragraph of the judgment delivered by him in the case of *Cassidy*. Still it may be that the learned Judge's remarks were applied to the particular facts of that particular case, and possibly they ought not to be read as having any application beyond the facts that were then before the Court.

1891

QUEEN-
EMPERESS
v.
NIDDA.

For the purpose of constituting an attempt under s. 307, Indian Penal Code, there are two ingredients required, first, an evil intent or knowledge, and, secondly, an act done. I guard myself by saying that not every act done would be sufficient, as has been pointed out in the well known case of *Regina v. Brown* (1). No one would suggest that if A intending to fire the stack of B, goes into a grocery shop and buys a box of matches, that he has committed the offence of attempting to fire the stack of B. But if he, having that intent and having bought the box of matches, goes to the stack of B and, lights the match, but it is put out by a puff of wind, and he is so prevented and interfered with, that would establish in my opinion an attempt.

It seems to me that if a person who has an evil intent does an act which is the last possible act that he could do towards the accomplishment of a particular crime that he has in his mind, he is not entitled to pray in his aid an obstacle intervening not known to himself. If he did all that he could do and completed the only remaining proximate act in his power, I do not think he can escape criminal responsibility, and this because, his own set volition and purpose having been given effect to to their full extent, a fact unknown to him and variance with his own belief intervened to prevent the consequences of that act which he expected to ensue, ensuing.

(1) L. R. 10 Q. B. D. 381.

1891

QUEEN-
EMPRESS
v.
NIDDHA.

For my own part, I think any other doctrine would be a most dangerous one to lay down, and it is some satisfaction to know that similar views have been expressed in the Crown Cases Reserved, *Regina v. Brown* (1), in which it was shown that the case of *Queen v. Collins* (2), which all criminal lawyers long doubted as sound authority, has been discarded as no authority, and further that the cases of *Regina v. St. George* (3) and *Regina v. Lewis* (4), which have also been seriously questioned, will in all probability be at the very first opportunity overruled.

In the present case, looking to all the facts, I have no doubt that the appellant had had his carbine capped ; that at the time he pulled the trigger and the hammer fell he believed it to be capped ; that, whether it was or was not capped at that time, the failure to discharge the weapon was wholly independent of any action of his ; and that not only did he have the intent to shoot the chaukidar and his party who were attempting to arrest him, but that he did the last proximate act that he could do to the completion of the full act that was within his intention and knowledge.

It is of course obvious that one might refer to many instances and examples, some of which would be within this rule and some would not, but I do not myself think that any useful purpose will be served by my prolonging this judgment. I have very carefully considered the words I have used above, and I think, as far as I am competent to put the matter into a clear and explicit form, that they lay down the true legal rule by which the determination of a question of this sort should be guided. I am of opinion therefore that the learned Judge might properly have convicted this appellant upon s. 307, and that he wrongly convicted him under ss. 299 and 300 read with s. 511.

I direct that the conviction be recorded under s. 307, Indian Penal Code, and I order that the sentence of five years' imprisonment stand.

(1) L. R. 24 Q. B. D. 357.

(3) 9 C. and P. 483.

(2) L. and C. 471 : S. C. 33 L. J. M. C. 177.

(4) 9 C. and P. 523.

REVISIONAL CRIMINAL.

Before Mr. Justice Knox

IN THE MATTER OF THE PETITION OF DAULAT SINGH

Criminal Procedure Code, s. 55—Subsequent treatment of persons arrested under the provisions of s. 55.

1891
August 31.

Where a person is arrested by the police under the provisions of s. 55 of the Code of Criminal Procedure he should always be given the option of release on reasonable bail being supplied.

THIS was a reference made under s. 438 of the Code of Criminal Procedure by the Sessions Judge of Meerut. The facts of the case sufficiently appear from the judgment of Knox, J.:

Knox, J.—The learned Sessions Judge of Meerut has sent up this case for revision of the order passed by the District Magistrate of Bulandshahr under s. 118 of the Code of Criminal Procedure. It appears that Daulat Singh, *alias* Dulla, the petitioner in this case, had been proved, either to the police in charge of the station within the circle of which the applicant resided, or to the Magistrate in charge of the district, to be an habitual robber and generally a bad character. The police professed to have arrested him under the powers vested in the police officer in charge of the station by s. 55 of the Code of Criminal Procedure, and the objection which the learned Sessions Judge takes to the order passed in the case is that such arrest was illegal, that upon such arrest the applicant was not admitted to reasonable bail, as he should have been, that he was detained in custody for some twenty days without proper information being given him as to the cause for which he was detained, and that this procedure had materially prejudiced the applicant in rebutting the allegation made against him, that he is a man of a notorious bad character. The second objection the learned Judge takes is that the evidence, or a considerable portion of the evidence, is of a character which cannot at present be believed in the Bulandshahr district. Over and above all this, the learned Sessions Judge is of opinion that the security demanded from the applicant is excessive.

1891
IN THE MAT-
TER OF THE
PETITION OF
JLAULAT
SINGH.

As I have already remarked in cases of this kind, the powers with which officers in charge of police stations and District Magistrates have been armed under the Code for the purpose of restraining bad characters are exceptional powers. They provide very strong remedies, and should never be put in force by either the Officer in charge of a police station or the Magistrate of a District, without the greatest deliberation, and except upon evidence which convinces the Magistrate that in the interests of public welfare, it is absolutely necessary to demand from the person before him security to be of good behaviour.

Still there can be no doubt that the Code of Criminal Procedure contemplated that cases would occur, though they might be rare and exceptional cases, in which it would be the clear duty of the Officer in charge of a police station to arrest or cause to be arrested any person within the limits of his station, who is by repute an habitual robber, house-breaker or thief, &c. It would and will be a clear dereliction of duty in such a case for police officers in charge of the station to abstain from arrest. While, on the one hand, any case in which the section was put into force without care and good faith would call for the strongest measures against the police officers so offending, on the other hand, the officer who has the courage honestly to act in a case of necessity under the powers given to him by the section is acting faithfully to the trust reposed in him. Comparing, however, s. 55 of the Code of Criminal Procedure with the provisions contained in s. 112 and the following sections, I think there is little doubt that s. 55 was intended, as the learned Judge rightly points out, for suppression of habitual bad characters whom an officer in charge of a police station suddenly finds within his circle, or about whom he has good cause to fear that they will commit serious harm before there is time to apply to the nearest Magistrate empowered to deal with the case under s. 112. That, at any rate, would be a safe way of using the powers given by the section. Looking to the explanation given by the Magistrate of Bulandshahr, while I am not prepared to say that the arrest by the police was illegal, I do think that it was unnecessary, and that it would have been better for the District Magistrate to have used *suo motu* the proce-

ture laid down in Chapter VIII of the Code. I am distinctly of opinion that when the police do act under s. 55 they are bound to give the person arrested the option of bail, and that bail shall be, as the Code requires, not excessive and in accordance with the position in life occupied by the person arrested. As regards the action of the District Magistrate, I am of opinion that the order in writing setting forth the substance of the information upon which he professes to act should always, except in cases in which action has been taken under s. 55 of the Code, accompany the summons issued under s. 114, and in no case should a Magistrate acting under s. 112 issue a warrant of arrest except upon the clearest grounds for belief that unless he issues such warrant a breach of the peace is inevitable. It is the intention of the Code that any man called to meet the exceptional procedure laid down in Chapter VIII, should at his own house have the fullest information compatible with the circumstances of the case as to the reasons why his liberty is in danger of being interfered with. Only where a breach of the peace is imminent should the action taken under Chapter VIII be of a prompt and vigorous nature. To deprive any person of his liberty is a most serious step to take, and it is hardly too much to say that every step in the process should show extreme deliberation and care, and if a person has to be arrested previous to inquiry he should be given the option of release upon proper bail. Now comes the question whether in this case the arrest by the police, the neglect to pass an order allowing bail being given, and the recording of information while the accused was under detention have been of such a nature as to materially prejudice the accused. Upon this point I have examined the case with very great anxiety. I find from the record that on the 5th June, Daulat was clearly asked what cause he had to show why he should not give sureties to be of good behaviour. It is unfortunate that at this point the Magistrate did not clearly tell him the amount of the bond he would be required to enter into, the time for which it would be in force, and the number, character and class of sureties which would be required. Had it been done the applicant might have shown that a bond of Rs. 1,000 and two sureties, zamíndárs, in the sum of Rs. 500 each

1891

IN THE MAT-
TER OF THE
PETITION OF
DAULAT
SINGH.

1891
IN THE MAT-
TER OF THE
PETITION OF
DAULAT
SINGH.

were wholly out of proportion to his means. I think there can be no doubt that, so far as this point is concerned, Daulat has been prejudiced to an extent which I cannot overlook. I do not find, however, that he was ignorant of the nature of the proceedings taken against him, or that any difficulties were put in his way of citing persons to depose to his character. He was given till the 12th June, as a first opportunity, and till the 23rd June, as the second opportunity for producing evidence as to good character and to rebut that which had been given against him. Not less than six witnesses were cited by him, and not one of those six, if the record can be trusted, was able to say with confidence that Daulat was a man of good repute. On the contrary, two of them deposed to his repute being distinctly bad. I have already remarked in previous cases that Magistrates of the District must and should be trusted as to the evidence on which they act. Where the record shows that they have been neglectful or careless or have been wanting in discretion I should be the first to interfere, but in the present instance twelve witnesses have deliberately sworn that the accused is an habitual thief and bad character. The evidence seems to have been carefully taken, and I do trust the Magistrate when he puts on record that he fully believes the information to be good and trustworthy. I do not therefore propose to interfere in the Magistrate's order further than to direct that Daulat execute a bond in the sum of Rs. 250 and furnish two sureties, zemíndárs, in the sum of Rs. 250 each, to be of good behaviour for the space of one year, and that in default of giving such security he suffer rigorous imprisonment until such security be given or the year expires, whichever event first occur. It is much to be regretted that the language used by the District Magistrate in the explanation which he furnished is not of a judicial and becoming nature. I allude particularly to the paragraph marked "seventhly" in his memorandum. Explanations of this kind are not intended as channels for criticism of the Court to which, for this purpose, a District Magistrate is subordinate. They should be brief and aim at pointing out facts which appear to have been overlooked or to have been misrepresented to the Judge, when they travel beyond that they are impertinent and improper.

Before Mr. Justice Knox.

IN THE MATTER OF THE PETITION OF ABDUL AZIZ.

1891

September 25.

Security to keep the peace—Power of the Magistrate of a district to call upon a person residing in another district to furnish security—Criminal Procedure Code, s. 107.

Section 107 of the Criminal Procedure Code does not empower a Magistrate to issue process under it to a person not residing within his jurisdiction.

In the matter of the petition of Jai Parkash Lal (1) followed. *Rajendro Chunder Roy Chowdhry* (2) and *Dinonath Mullick* (3) approved.

This was a reference under s. 438 of the Code of Criminal Procedure made by the Sessions Judge of Gorakhpur. The facts of the case, so far as they are necessary for the purposes of this report, are contained in the referring order, which is as follows :—

“This is an application praying for revision of an order of Mr. Hose, District Magistrate, directing applicant to find two sureties for Rs. 1,000 each to keep the peace for one year.”

The applicant has property in the Gorakhpur district but he is a resident of mauza Nandaur, police station Mendhawal, in the Basti district, and the chief contention is based on the ruling of a Full Bench of the Allahabad High Court in the case of *Jai Parkash Lal*, where it was decided that a Magistrate acting under s. 107, Criminal Procedure Code, has no jurisdiction over a person residing beyond his local jurisdiction, and this view of the law has also been adopted by the Calcutta High Court in the cases of *Rajendro Chunder Roy Chowdhry* and *Dinonath Mullick*.

Under these circumstances, without entering into the merits of the case, I am compelled to find that the Magistrate's order was *ultra vires*, and the record will be forwarded to the Hon'ble High Court with the recommendation that the order of the Magistrate, dated the 16th June 1891, be set aside.”

On this reference following order was made by Knox, J.

KNOX, J.—The order of the Magistrate was *ultra vires* and must be set aside at once. The applicant and his sureties, if any, will be released from any bond into which they may have entered.

(1) I. L. R., 6 All., 26.

(2) I. L. R., 11 Calc., 737.

(3) I. L. R., 12 Calc., 133.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell and
Mr. Justice Knox.

RADHA PRASAD SINGH (PLAINTIFF) v. MATHURA CHAUBE
(DEFENDANT).*

1891
November 9.
Act XII of 1881 (North-Western Provinces Rent Act), s. 189—Act XIV of 1886 (amending Act XII of 1881), s. 5 —“Rent payable by the tenant” Appeal.

The words “rent payable by the tenant” in s. 189 of the North-Western Provinces Rent Act (XII of 1881) (as amended by Act XIV of 1886) mean the rate of rent payable by the tenant and not merely the actual amount of money which is due at any given time by the tenant to his landlord as rent.

Where a zamindār sued a tenant for rent of certain alluvial land, the amount claimed not being above Rs. 100, and the tenant objected that there was a custom in the village by which rent was paid in case of alluvial land only on the culturable portion, and that during some of the years in suit a less portion of the land than that for which rent was claimed had been culturable :—*Held* that in such a suit the rate of rent was in dispute and an appeal would therefore lie. *Radha Prasad Singh v. Pergash Rai* (1) followed: *Payag Sahu v. Matadin* (2) overruled.

The facts of this case were as follows :—

The plaintiff-appellant sued in the Court of the Deputy Collector to recover from the defendant-respondent a sum of Rs. 54-11-6, alleging the same to be due as rent of certain land from 1292 to 1295 fasli together with interest on the same. The defendant pleaded limitation as to one year and as to the rest that the land in question was a *divra*, and recording to local custom rent was only payable on the culturable portion, which, he alleged, was during those years less than it was stated by the plaintiff to be. The Deputy Collector found that the claim as to 1292 fasli was barred; that the interest claimed was correct, and, allowing apparently the validity of the defendant's contention as to the area of the land, decreed the plaintiff's claim in part. The plaintiff thereupon appealed to the District Judge who dismissed the appeal on the ground that—“The value is below Rs. 100. There has been no determination of proprietary right or of the rate of rent payable.” The plaintiff then

* Second Appeal No. 1030 of 1889 from a decree of F. W. Fox, Esq., District Judge of Ghazipur, dated the 29th May 1889, confirming a decree of Maulvi Muhammad Nasi, Deputy Collector of Ghazipur, dated the 31st May 1888.

(1) I. L. R., 13 All., 193.

(2) Weekly Notes, 1890, p. 229.

appealed to the High Court. The appeal came before Mahmood J., who, in view of certain conflicting rulings of the Court referred the case to a Bench of three Judges.

The Hon'ble Mr. *Spankie*, for the appellant.

Mr. *J. Simeon*, for the respondent.

1891

RADHA
PRASAD
SINGH

v.
MATHURA
CHAUBE.

EDGE, C. J., TYRRELL and KNOX, JJ.—This appeal has arisen out of a suit brought by a zamíndár against his tenant to recover alleged arrears of rent and interest amounting to Rs. 54-11-6.

The third plea in defence in effect was that by the custom of the *ilaka* and of the particular *mahál* the tenant was entitled to a deduction from the rent in respect of the land which became sub-merged or in which the seed had not been germinated, and that according to the custom, in order to ascertain the rent payable the land had to be measured annually. We need not trouble ourselves with the question as to whether in fact there was such a custom or not in conflict with the agreement between the zamíndár and his tenant. Those are matters yet to be decided, amongst others, by the lower appellate Court, if an appeal lay to that Court. An appeal was brought to the lower appellate Court and that appeal was dismissed by that Court on the ground that the amount or value of the subject-matter did not exceed Rs. 100, and that the rent payable by the tenant within the meaning of s. 189 of Act XII of 1881, was not a matter in issue. From that decree the plaintiff has brought this second appeal. It came on to be heard before a Single Bench and the Single Judge being pressed with the contention that there was a conflict between a decision of Mr. Justice Young, [*Payag Sahu and others v. Matadin and others* (1)] and a concurring judgment of our brother Straight and Mr. Justice Young, [*Radha Prasad Singh v. Pergash Rai* (2)] referred the appeal to this Bench. The case as presented to us involves two questions, one as to the construction of s. 189 of Act XII of 1881, so far as the meaning of the words "rent payable" is concerned; the other, whether the "rent payable" was a matter in dispute

(1) Weekly Notes, 1890, p. 229.

(2) I.L.R., 13 All. 193.

1891

RADHA
PRASAD
SINGH
v.
MATHURA
CHAUBE.

and to be determined in this suit within the meaning of that section. It has been held in the case to which we have lastly referred that the words "rent payable" in the section mean a rate of rent, and that is the view which we take of the section. In our opinion the rent payable in that section means the rate of rent payable, and that is the view which was adopted in an unreported judgment of which one of us was a party along with Mr. Justice Brodhurst. When s. 189 was amended we do not think it could have been the intention of the Legislature to have given an appeal in those rent cases where the only question in dispute was how much of an agreed rent had been paid or not, if the matter in dispute was under Rs. 100. In other words, they could not have intended, for example, that there should be a series of appeals over a question as to whether the tenant had in fact paid Rs. 16, portion of an admitted rent. It is a wholly different matter where the question of the rate of rent is concerned. The determination of the question of the rate of rent might affect the parties as landlord and tenant for a great number of years, and consequently the Legislature in our opinion intended that when the rate of rent was in dispute and had to be decided there should be an appeal. In the case to which we first referred, Mr. Justice Young was clearly of opinion that if the point had been merely what was the actual amount which the tenant in that case had paid in liquidation of his rent, the appeal would not be under s. 189, but he seems to have put too narrow a construction on the expression "rate of rent." He seems to have thought that to ascertain the rate of rent it would never be necessary to ascertain the area of the land. It appears to us that where the dispute is as to the rate of rent that dispute may be raised in many different ways, as for example, where the landlord said the rent payable was Rs. 100 and the tenant said it was Rs. 50 a year, then there would be a dispute as to the rent payable. It might in another case be necessary to ascertain the area in order to find what was the rent payable or rate of rent for any particular year under the terms of a particular contract, or according to the custom which prevailed. Here, in our opinion, there was a dispute as to the rate of rent. The tenant said that by reason of the custom the rent

payable for those particular years was not the rent alleged by the zamíndár. The appeal in our judgment lay to the Court below.

We allow the appeal, set aside the decree below and remand the case under s. 562 of the Code of Civil Procedure, and order the case to be reinstated on the list of pending cases and disposed of according to law. The costs of this appeal will abide the result.

Cause remanded.

1891

RADHA
PRASAD
SINGH
v.
MATHURA
CHAUBE.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

CHAIN SUKH RAM AND ANOTHER (Plaintiffs) v. PARBATI AND ANOTHER (Defendants) AND MANSA RAM AND OTHERS (Plaintiffs) v. SUNDAR AND ANOTHERS (Defendants)*.

1891
November 28.

Hindu Law—Custom—Adoption of sister's son—Bohra Brahmans.

Amongst the Bohra Brahmans of the northern districts of the North-Western Provinces there exists a valid and legal custom in virtue of which a person of that caste can adopt his sister's son.

These were two suits which both related to the same property and raised the same question of law, *viz.*, as to the possibility of a person of the caste known as "Bohra Brahmans" making a valid adoption of his sister's son. The appeals were heard together and one judgment pronounced in both. The facts of these cases so far as they are necessary for the purposes of this report sufficiently appear from the judgment of the Court.

Babu *Rajendro Nath Mukerji*, for the appellants
Pandit *Ajudhia Nath*, Munshi *Kashi Prasad* and } in F. A. No 154.

Pandit *Sundar Lal*, for the respondents.

Mr. *Conlan* and Mr. *D. Banerji*, for the appellants.

Pandit *Ajudhia Nath*, Munshi *Kashi Prasad*,
Pandit *Sundar Lal* and Babu *Rajendro Nath Mukerji*, for the respondents. } in F.A. No. 162.

EDGE, C. J. and TYRRELL, J.—In these two first appeals which have been heard by us we thought it advisable to deliver a written

* First appeal Nos. 154 and 162 from the decrees of Munshi Madho Lal, Subordinate Judge of Saharanpur, dated the 11th August 1889.

1891
 CHAIN SUKH
 RAM
 v.
 P'ABBATI.

judgment, as the questions upon which the appeals in our judgment depend are questions of very great importance to a considerable portion of the Hindu community in some of the northern districts of these provinces.

The suits out of which these appeals have arisen were suits in which the possession of property was claimed.

First Appeal No. 154 of 1889 was from a decree of the Subordinate Judge of Sahāranpur dismissing the original suit No. 151 of 1885. In that suit the plaintiffs alleged that one Prem Sukh Das, deceased, became the owner and possessor of certain property specified in the plaint under a will made in 1875 by one Baldeo Sahai, who had been the proprietor. The plaintiffs alleged that on the death of Prem Sukh Das without issue, on the 3rd of December 1879, his estate devolved according to Hindu law on the descendants of Ishar Das, and that one Mangal Ram, who was one of such descendants, by a deed dated the 30th of July 1885, gave his one-third share to the plaintiffs. The plaintiffs sought by their suit to recover such one-third share from the defendants, Musammat Parbati and Musammat Sundar, who are the widow of Baldeo Sahai and are in possession.

First Appeal No. 162 is from a decree of the Subordinate Judge of Sahāranpur which dismissed the original suit No. 30 of 1886. In the latter suit the plaintiffs, who are two of the descendants of Ishar Das, claimed certain shares in the same property, which had been of Baldeo Sahai, alleging that Prem Sukh Das took that property under the will of Baldeo Sahai of 1875, and that on the death without issue of Prem Sukh Das on the 3rd of December 1879, the property devolved according to Hindu law on the descendants of Ishar Das.

The plaintiffs in original suit No. 30 of 1886 sought to recover the shares to which they alleged that they were entitled from Musammat Parbati and Musammat Sundar, the widows of Baldeo Sahai. The plaintiffs in original suit No. 151 of 1885 were made *pro formā* defendants in original suit No. 30 of 1886.

In each suit mesne profits were claimed.

1891

The main defence relied upon by Musammat Parbati and Musammat Sundar in each suit was that Prem Sukh Das had been adopted in 1871 as a son by Baldeo Sahai, and that Prem Sukh Das having been so adopted took the property of Baldeo Sahai as such adopted son and not under the will of 1875, and that according to Hindu law the property of Prem Sukh Das as the adopted son of Baldeo Sahai did not devolve on his death, or at all, upon the descendants of Ishar Das, and that the widows of Baldeo Sahai were not only in possession but were entitled as the mothers of Prem Sukh Das to the possession of all the property claimed.

CHAIN SUKH
RAM
v.
PARBATI.

Prem Sukh Das was the son of Chajju Ram, who was a grandson of Ishar Das. Prem Sukh Das' mother was a sister of Baldeo Sahai. Baldeo Sahai was not descended from Ishar Das, Baldeo Sahai and Chajju Ram were Bohra Brahmans. On behalf of the defendants respondents, Musammat Parbati and Musammat Sundar, it was not contended that according to the Hindu law, apart from custom, Baldeo Sahai could legally have adopted his sister's son, Prem Sukh Das, but it was contended that, according to a general custom of Bohra Brahmans in the part of the country in which Baldeo Sahai and Chajju Ram resided, a Bohra Brahman could legally and validly adopt his sister's son. On behalf of the plaintiffs-appellants in First Appeal No. 154 of 1889, it was contended before us that Baldeo Sahai never did in fact adopt Prem Sukh Das, and further, that if Baldeo Sahai did in fact adopt Prem Sukh Das, the custom alleged by Musammat Parbati and Musammat Sundar was not proved to exist, and if it did exist it could not control or vary the Hindu law, and that the alleged adoption was consequently illegal and void.

On behalf of the plaintiffs appellants in First Appeal No. 162 of 1889, the fact that Baldeo Sahai had adopted Prem Sukh Das was not disputed, but it was contended that no such custom as alleged had been proved, or, if proved, could control or vary the Hindu law, and that the adoption was consequently illegal and void.

1891
 CHAIN SURB
 RAM
 v.
 PARBATI.

On behalf of Musammat Parbati and Musammat Sundar it was further contended that by reason of Art. 118 of the second Schedule of the Indian Limitation Act (Act XV of 1877) neither the fact nor the the validity of the adoption of Prem Sukh Das could now be questioned. In support of this last contention the decision of their Lordships of the Privy Council in *Jagadamba Chowthrani v. Dakkhina Mohun* (1) was relied upon. Being of opinion, for reasons presently to be stated, that the fact of the adoption and the custom relied upon in support of the validity of that adoption have been proved, and that the custom which has been proved is a valid custom, we do not intend to express any opinion upon the question of limitation or on the other questions which it would become necessary to consider if we were of opinion that the adoption had not in fact taken place or was invalid. It is common ground that if Prem Sukh Das was validly adopted by Baldeo Sahai, the plaintiffs appellants in each appeal, have no title to the property, or any of it, in dispute.

We shall first deal with the question as to whether such a custom as that alleged can legally exist, and can control and vary the Hindu law applicable to adoption amongst Brahmans. On behalf of the plaintiffs-appellants, it was strongly contended that the point was concluded by the judgment of their Lordships of the Privy Council in *Sundar v. Parbat* (2), in which case their Lordships, at page 193 of the Report, are reported to have said:—"If it were necessary to determine the point, their Lordships would probably have little difficulty in accepting the opinion of the High Court that a Hindu Brahman cannot lawfully adopt his own sister's son." In that case, in which the suit was between the now defendants-respondents, Musammat Parbati and Musammat Sundar, and by which Musammat Sundar sought a decree for partition of the property now in suit, the question as to whether such a custom as is now alleged could be valid was not before their Lordships of the Privy Council or before this Court when that case was before this Court, on appeal from the decree of the 27th of February 1884 of

(1) L. R. 13 I. A. 84; s. c.,
 I. L. R. 13 Calc. 308.

(2) L. R. 16 I. A. 186.

the Subordinate Judge of Sahāranpur, although it has, during the arguments of these appeals, been stated, but whether correctly or not we have nothing on these records of show, that evidence of the alleged custom was tendered in the Court of the Subordinate Judge in that case. The validity of such a custom by which a sister's son may be adopted amongst Nambudri Brahmans in Malabar, and of a similar custom by which a daughter's son may be adopted amongst the Brahmans of Tanjore, Trichinopoly and Tinnevely have been judicially recognized by Full Benches of the Madras High Court in the cases *Eranjoli Illath Vishnu Nambudri v. Eranjoli Illath Krishnan Nambudri* (1) and *Vayidinada v. Appu* (2). The validity of a custom by which, amongst certain tribes of Brahmans in the Panjáb, a sister's son or a daughter's son may be adopted has been judicially recognized by the Chief Court of the Panjáb. The cases relating to the Panjáb are collected in the notes to pages 341 and 342 of Golap Chandra Sarkar's *Hindu Law of Adoption* (Tagore Law Lectures 1888). That the generally accepted rule of the Hindu Law which prohibits amongst the twice-born classes the adoption of a sister's or a daughter's son has been in many parts of India controlled and varied by custom, or possibly never followed, may be gathered from the cases collected in the notes to paragraph 124, pages 137 and 138 of the 4th edition of Myne's *Hindu Law and Usage*. In Mandlik's *Hindu Law of Mayukha and Yajnavalkya* at page 478 *et seqq.* grave doubts are raised to the authenticity of the alleged principle of Hindu Law that the person to be adopted must be one who, by a legal marriage with his mother, might have been the legitimate son of the adopter. Mr. Mandlik in his valuable treatise contends that the grafting on to Hindu Law of that principle is the result of wrong analogies and unwarranted generalization founded on imperfect translations of original texts. Mr. Mandlik, at page 478, speaking of the Bombay Presidency, says: "In like manner is the adoption of a sister's common among the Hindus in this Presidency amongst all castes and classes. Still more common is the adoption of a dauhetra (daughter's son)." The

1891

CHAIN SUKH

RAM

V.

PARBATTI.

(1) I. L. R., 7 Mad. 3.

(2) I. L. R., 9 Mad. 44.

1891
CHHAIN SUKHE
RAM
v.
PARBATHI.

question as to whether Mr. Mandlik's views as to the origin and authenticity of the principle referred to are correct or not must now be left for the decision of their Lordships of the Privy Council. Fortunately for us, we need not in the appeals now before us express any opinion on that subject. Assuming for present purposes that the rule laid down by Mr. Sutherland in 1831 that "The first and fundamental principle is that the person to be adopted be one who by a legal marriage with his mother might have been the legitimate son of the adopter," is the correct rule of Hindu Law applicable to the three superior or twice-born classes of Hindus, we need only say that we agree with the learned authors of West and Bühler's Digest of Hindu Law that the Hindu Law is "subject, even without a statutory provision, to modification by custom, which indeed may be regarded as the basis, for all secular purposes, of the Hindu Law itself. Thus when a custom is proved it supercedes the general law so far as it extends, but the general law still regulates all that lies beyond the scope of the custom." (West and Bühler's Digest of Hindu Law, 3rd edition, Vol. I., pp 1 and 2).

Their Lordships of the Privy Council have recognized the fact that Hindu Law may be varied by custom in such important matters, amongst others, as the descent in a family and the partibility of ancestral property.

We entertain no doubt that a custom amongst Bohra Brahmans generally or among Bohra Brahmans of a particular part of the country that a sister's son may be adopted, if proved, is a valid custom and legalises such an adoption.

We shall now proceed to consider whether or not such a custom has been proved so far as the Bohra Brahmans of that part of the country within which and in the neighbourhood of which Baldeo Sahai and Chajju Ram resided are concerned.

The Bohra Brahmans came into the northern districts of these Provinces from Palli or Pali in Rajputana. They are a caste of trading Brahmans, as the name of the caste indicates. According to Fallon's Hindustani-English Dictionary, at page 283, "bohra" means "a village banker or money-lender," and also according to

Fallon "the Bohras appear to have originated in Guzerat, where they became converts to Muhammadanism, but they are settled in many parts of Central and Western India and in the North-Western Provinces."

1891
CHAIN SUKH
RAM
v.
PARBATI.

In that part of the Statistical Description and Historical Account of the North-Western Provinces of India, prepared under the orders of the Government of India, which relates to the district of Muzaffarnagar, volume 3, part 2, page 494, we find it stated that "the Rahtis or Bohras are sometimes classed amongst the subdivisions of the Gaur tribe of the great Gaur division under the names of Palliwals, but they are now so completely separated from the Brahmans as a body that they are usually regarded as one of the miscellaneous tribes of Brahmanical origin. Other names for this tribe are Athwariya, Barbar and Kaniya. These Bohras are emigrants from Marwar, and are called Palliwal from their original seat, Palli. They are the great usurers and pawnbrokers of the Upper Duab, &c."

In the course of the arguments before us the evidence recorded in each suit was read by those who appeared for the different parties as evidence in both suits. It was stated by the Pandit *Ajudhia Nath* who appeared for Musammat Parbati and Musammat Sundar in First Appeal No 154 of 1889, but disputed by those who represented the other parties, that in the Muzaffarnagar and neighbouring districts the priests of the Banias were Bohra Brahmans. There is no evidence before us on the point, and we merely mention the statement as an explanation which was offered of the fact that there is much evidence on the records in the appeals before us of a custom amongst those of the Bania caste of that part of the country by which a sister's son may be adopted.

In support of the existence of the custom amongst Bohra Brahmans there were, amongst others, a great number of Bohra Brahman witnesses called. At least ten of those Bohra Brahman witnesses were from the Muzaffarnagar district, seven were from the Meerut district, whilst others of them were from Bulandshahr,

1891
CHAI SUKH
RAM
v.
PARBATI.

Aligarh, Delhi, Saháranpur, Muttra, Etáwah and Cawnpore. All of those witnesses spoke to the present existence of the custom, many of them gave instances of adoptions of sister's sons and many of them said that they had been informed by their fathers and ancestors that the custom existed. So far as has been brought to our attention there were only two cases of such adoption in which it was shown that the adopted son had not succeeded to the property of the person who had adopted him, and in one of those two cases the adopted son had received from the other members of the family a substantial sum in money. We agree with the Subordinate Judge that the custom was proved. We see no reason for thinking that all those Bohra Brahman witnesses, to whom we have referred, committed perjury. We were much pressed with the fact that Baldeo Sahai had in 1875 executed a will in favor of Prem Sukh Das. It was contended from that fact that Baldeo Sahai had never, in fact, adopted Prem Sukh Das and that if he had, in fact, adopted Prem Sukh Das he knew that the adoption was invalid, and on the latter point the evidence in cross-examination of Musammat Parbati (document No. 448) was also relied upon. In cross-examination Musammat Parbati said, "Baldeo Sahai had executed the will also in favor of Prem Sukh. I had asked Baldeo Sahai why he was executing the will. He told me that it was not allowed in the Shastars to adopt a son of a sister. Baldeo Sahai was under the impression that it was not allowed in the Shastars to adopt a nephew." It is very possible that Baldeo Sahai may have been under the impression that such an adoption was invalid according to the Shastars and that the custom amongst the Bohra Brahmans might not be held by the Courts as sufficient to validate the adoption. One thing which is obvious is that Baldeo Sahai intended, in the event of a son or sons being subsequently born to him, to secure by his will to Prem Sukh Das a greater share of the property than Prem Sukh Das would under such circumstances take as an adopted son.

Whatever may have been the opinion, the doubts or objects of Baldeo Sahai in 1875, it is in our opinion beyond doubt that

Baldeo Sahai in 1871 did, in fact, adopt Prem Sukh Das, and did so under circumstances of the greatest publicity. To witness the ceremony of that adoption large numbers of Bohra Brahmans were invited and at that ceremony many of them attended. The fact of the adoption having taken place was well known amongst the brotherhood and amongst the Bohra Brahmans of that part of the country. When Baldeo Sahai died, mutation of names took place in favor of Prem Sukh Das and in those mutation proceedings Prem Sukh Das was described as the adopted son of Baldeo Sahai. He was so described in the mutation proceedings or in the village papers relating to at least eleven villages. This appears by the documents numbered 820, 821, 822, 823, 824, 825, 826, 827, 829, 830 and 831.

1891
CHAIM SUKH
RAM
v.
PARBATI.

The will was made in 1875. After the making of the will Prem Sukh Das, suing under the guardianship of Baldeo Sahai, was in his two petitions of the 5th of December 1877 (documents Nos. 818 and 819) described as the adopted son of Baldeo Sahai. The will of 1875 affords evidence of the adoption. There is a passage in it which, correctly translated, is as follows :—

“Prem Sukh, son of Chajju Ram, my own sister's son, whom I have brought up and educated like my son from his childhood, whom I have made, by performing the usual ceremonies of investiture with the sacred thread, &c., my heir, representative and successor, and who has from of old lived with me, shall, after me, be the proprietor and heir of all the properties, &c.”

On the 26th of February 1879, a certificate of guardianship of the estate of Prem Sukh Das was granted by the Subordinate Judge of Saháranpur to Kanhai Ram and two others. That Kanhai Ram is one of the plaintiffs-appellants in First Appeal No. 162 of 1889, and in that certificate Prem Sukh Das is described as the adopted son of Baldeo Sahai, deceased.

It has been pressed upon us that in the suit between Musamat Sundar and Musammat Parbati the latter lady denied the adoption.

1891

CHAIN SUKH
RAM
".
PARBATI.

In that suit Musammat Parbati, who was the senior widow, was attempting to exclude the Junior widow, Musammat Sundar, from a share in the property, and with that object in view she was bound in the then view of then legal rights of those ladies *inter se* to deny the adoption. Musammat Parbati in that suit alleged that she alone was in possession. Whatever Musammat Parbati's contention was in that suit, she, during the lifetime of Prem Sukh Das, on the 11th February 1879, joined Musammat Sundar in a petition (document No. 19) presented to prevent the property being brought under the Court of Wards, and in that petition described Prem Sukh Das as the adopted son of Baldeo Sahai. In that petition the ladies state that they had appointed Lala Sukh Lal, Kanhai Ram, "the own paternal uncle of Prem Sukh Das," and Raghunath, *sarbarahkar* and managers, and had applied for the grant of a certificate of guardianship to them. That petition was presented through Tara Chaud, who was a mukhtar of Musammat Parbati and Musammat Sundar. Tara Chand's mukhtarnáma is dated the 11th of February 1879, and is document No. 20. It was witnessed by Chain Sukh Ram, who is one of the plaintiffs-appellants in First Appeal No. 154 of 1889, and who on the 11th of February 1879 described himself as "Chain Sukh, servant of Prem Sukh Das," as in fact he was.

There are many other documents on the records of these two appeals to which, if it were necessary, we might refer in support of our opinion that Prem Sukh Das had in fact been adopted by and had been openly treated and acknowledged as the adopted son of Baldeo Sahai. We may mention that on the death of Prem Sukh Das his funeral obsequies were performed by one Nathu, who was of the gotra of Baldeo Sahai, and consequently competent to perform those obsequies. He appears to have performed them on behalf of Musammat Parbati and Musammat Sundar. If there had been no valid adoption of Prem Sukh Das his obsequies would have been performed by one of the gotra of Chajju Ram, and Nathu would have been incompetent to perform them.

On an examination of the oral and documentary evidence we have no doubt that Prem Sukh Das was, in fact, adopted by Baldeo

Sahai and that his adoption was by reason of the custom a valid and legal adoption.

1891

CHAIN SUKH
RAM
v.
PARBATI.

Before concluding our judgment it may be interesting to see how this present litigation arose.

In 1871 Baldeo Sahai adopted Prem Sukh Das. In December 1878 Baldeo Sahai died. On the death of Baldeo Sahai, Prem Sukh Dassucceeded to the property. Prem Sukh Das died on the 3rd of December 1879. He was then 16 years old. On the death of Prem Sukh Das, Musammat Parbati and Musammat Sundar took possession of the property as his heiresses, a fact which appears not only from other evidence but also from some *bujharat* statements of 1290 fasli, where they are recorded as "Mothers of Prem Sukh Das." Disputes having subsequently arisen between them, Musammat Sundar brought her suit against Musammat Parbati for partition. In that suit Musammat Parbati alleged that she alone was in possession and denied any title in Musammat Sundar. In First Appeal in that suit this Court on the 12th of June held that the adoption of Prem Sukh Das was, by reason of his being the sister's son of Baldeo Sahai, invalid, and holding that the Musammats had no title in law and that the suit for partition was not maintainable merely by reason that they were in possession, dismissed Musammat Sundar's suit. On the 30th of July 1885 Mangal Ram, the grandson of Ishar Das, is alleged to have executed the deed of gift in favor of Chain Sukh Ram and Ghazi Ram, the plaintiffs-appellants in First Appeal No. 154 of 1889, upon which they rely. On the 4th of September 1885 those plaintiffs-appellants brought the suit. Mangal Ram was not related to Chain Sukh Ram or to Ghazi Ram. Chain Sukh Ram had been in the employment of Prem Sukh Das; he is married to a sister of Musammat Parbati and is and was an agent of hers. Ghazi Ram is the minor brother of Musammat Parbati. Mansa Ram and Kanhai Ram, the plaintiffs-appellants in First Appeal No. 162 of 1889 and descendants of Ishar Das brought their suit on the 18th of January 1886. None of those plaintiffs-appellants could have any title to the property if the adoption of Prem Sukh Das was a valid adoption. Neither Mansa Ram, Kanhai Ram

1891
 HAIN SUKH
 RAM
 v.
 PARBATI.

nor Mangal Ram appears to have raised any claim to the property or to have questioned the validity of the adoption until after the decision of this Court of the 12th of June 1885, although Prem Sukh Das had died on the 3rd of December 1879. One may infer that the descendants of Ishar Das and relations of Chajju Ram, the natural father of Prem Sukh Das, never thought, until that decision of this Court, that the validity of the adoption of Prem Sukh Das could be questioned.

We dismiss, with separate sets of costs to Musammat Parbati and to Musammat Sundar, First Appeal No. 154 of 1889 and affirm the decree below. We dismiss, with separate sets of costs to Musammat Parbati and to Musammat Sundar, First Appeal No. 162 of 1889 and affirm the decree below.

Appeals dismissed.

Before Sir John Edge, Kt, Chief Justice, and Mr. Justice Tyrrell.

1891
 December 2.

KISHAN SAHAL (OBJECTOR) v. ALADAD KHAN AND ANOTHER,
 (DECREE-HOLDERS).*

*Civil Procedure Code, s. 13, Expl. II—Res judicata—Execution of decree—
 Principle of res judicata as applied to execution proceedings*

Where a person on his own application was added as a party respondent to an appeal, and on the case in appeal being remanded under s. 562 of the Code of Civil Procedure for re-trial on the merits, practically took no steps whatever to defend the suit.—*Held* that he could not afterwards plead, by way of objection to execution of the decree, matters which ought to have formed part of his defence to the suit, had he chosen to defend it. *Ram Kirpal v. Rûp Kuari* (1) referred to.

The facts of this case sufficiently appear from the judgment of the Court.

Mr. T. Conlan and Pandit Sundar Lal, for the appellant.

Mr. Abdul Raoof, for the respondents.

EDGE, C. J. and TYRRELL, J.—This is an appeal arising out of the execution of a decree. One Aladad Khan brought his suit against Ismail Khan and others in which he claimed possession of

* First Appeal No. 9 of 1890, from a decree of Rai Piari Lal, Subordinate Judge of Meerut, dated the 12th November 1889.

(1) I. L. R., 6 All. 269.

his share of his father's estate. His suit was dismissed in the first Court on the finding that he was illegitimate. It finally came in appeal before this Court. Aladad Khan was the appellant, and during the pendency of the appeal in this Court, Lala Kishan Sahai, who is the appellant in this execution-appeal, presented a petition on the 11th May 1887 to this Court, alleging that he was the purchaser of the property in suit and asking to be made a respondent in the case, the case being the appeal. On the same day this Court passed an order under ss. 372 and 582 of the Code of Civil Procedure, adding him as a respondent in the suit. The result of the appeal here was that on the 7th April 1888, this Court allowed the appeal, holding that the plaintiff, Aladad Khan, was legitimate and the suit was remanded under s. 562 of the Code of Civil Procedure for trial on the merits. Now, as we have said, that order of remand was made on the 7th April 1888. Kishan Sahai was a party to that order of remand. The 29th January 1889 was fixed in the Court below, we assume, for the hearing of the case, and on the 12th of that month Kishan Sahai presented an application (document No. 11) in which he asked for two months' time, on the ground that he had not his documentary evidence ready. On the 15th January 1889, the Subordinate Judge passed an order allowing Kishan Sahai one month's time and fixing the hearing for the 6th March 1889. The day before the 6th March, *viz.*, on the 5th March, Kishan Sahai presented an application alleging that he had been induced by false representations of the plaintiff, Aladad Khan, to advance the money on the property and asking that he might be brought in as a party to the suit under s. 32 of the Code of Civil Procedure, and be allowed to put in a defence, and that issues might be framed and the case tried as against him. On the 6th March 1889, the Subordinate Judge rightly held that as the High Court had made him a party to the suit, by its order to which we have referred, he must be regarded as a party until his name should be struck off, and that his position was not that of a party merely to the appeal, and refused the application. Now Kishan Sahai, if he had chosen to do so, could long before the 5th March 1889 have filed a written statement raising any defence which he

1891

KISHAN
SAHAI
v.
ALADAD
KHAN.

1891

KISHAN
SAHAI
v.
ALADAD
KHAN.

had or thought he had. The suit as against him commenced from the time when he was made a party to it, and, for the matter of that, if he had been so disposed, he might have filed his written statement in this Court even during the pendency of the appeal. Kishan Sahai does not appear to have taken any steps prior to the 5th March 1889 to file a written statement, either in this Court or in the Court below, and it is to be observed that in the petition which he presented to this Court upon which the order of the 11th May 1887 was passed, he merely alleged his title as that of a purchaser holding a sale-certificate. Ultimately, the Subordinate Judge, on the re-trial of the suit under the order of remand of this Court, decreed the plaintiff's claim for possession. When the plaintiff proceeded to execute that decree Lala Kishan Sahai filed objections, seven in number, only one of which, namely, No. 6, is relied on here; indeed, there is nothing in the other objections. Now as to that, Lala Kishan Sahai should have raised as a defence the matter alleged in that paragraph 6, if it amounted to a defence at all. He should have done so either in this Court when the case was here or at the latest in the Court below in proper time. Under the circumstances, we are of opinion that it is a case which falls within the principle of explanation ii. of s. 13 of the Code of Civil Procedure. Although s. 13 may not in terms apply, by reason of the matter not having been decided in another suit, still, the Privy Council in an analogous case has told the Courts in India that the principle of law underlying s. 13 is to be applied to proceedings in the execution of decrees. The case to which we refer is *Ram Kirpal v. Rup Kuari* (1). In fact, until the Subordinate Judge was on the eve of deciding the suit before him on remand Lala Kishan Sahai never suggested apparently any such defence as that shadowed forth in paragraph 6 of his objections. We dismiss this appeal with costs.

Appeal dismissed.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Mahmood, and Mr. Justice Knox.

RENI PRASAD (PLAINTIFF) *v.* HARDAI BIEI AND ANOTHER
(DEFENDANTS).

1892
February 4.

*Hindu Law—Benares School—Adoption—Adoption of only son—Maxim,
quod fieri non debuit factum valet.*

According to the Benares School of Hindu Law, the giving in adoption of an only son is sinful, and to that extent contrary to the Hindu Law; but the adoption of such a son, having taken place in fact, is not null and void; and the maxim *quod fieri non debuit factum valet* is applicable and should be applied to such an adoption.

So held by the Full Bench. *Hanuman Tiwari v. Chirai* (1) approved and followed.

In this case the following questions were referred to the Full Bench by Mahmood and Young, JJ.:—

“1. The adoption of an only son having taken place in fact, is such adoption null and void under the Hindu law?”

“2. If so generally, does subsequent birth of sons to the natural parents of the adopted son, have a retrospective effect of validating the adoption?”

“3. Does the circumstance that the adopted son is a *Sagotra*, or descended from one common ancestor with the adoptive father, render his case an exception to the general rule of prohibition against adoption of only sons?”

It was stated in the order of reference that, in consequence of doubts having been cast on the correctness of the ruling of the Full Bench in *Hanuman Tiwari v. Chirai* (1), it was desirable that that ruling should be reconsidered by the whole Court.

Mr. Dwarka Nath Banerji and Munshi Juala Prasad, for the appellant.

Mr. Jogindro Nath Chaudhry and Munshi Kashi Prasad, for the respondents.

(1) I. L. R., 2 All., 164.

1892
BENI PRASAD
v
HARDAY
RIBI.

EDGE, C. J.—Three questions have been referred for the opinion of the Full Bench. I propose to consider the first question, and that only. It is, “The adoption of an only son having “taken place in fact, is such an adoption null and void under the “Hindu law?”

The adoption in question was one in the *dattaka* form, and the parties were Agarwala Banias of Benares.

The question is one as to which there has been and is much difference of opinion in the Courts in India. It is not suggested, and, indeed, I am satisfied that it could not be suggested, that there is, apart from the written sacred law of the Hindus, any custom which would make such an adoption void. Nor is it suggested that the texts of the Hindu Law, or the passages in the books of the Hindu commentators, which have been regarded by some as imperatively prohibiting the adoption of an only son, were founded on a custom. No custom in Benares to make such an adoption has been alleged. Consequently, the answer to the question in this case does not depend on any custom, and must be sought for in the written law of the Hindus. The question is one surrounded by much difficulty. The difficulty mainly consists in ascertaining what is the true and reasonable construction to be put on certain texts of the sacred law of the Hindus, and upon certain passages in the works of Hindu commentators, and further in ascertaining how far such passages can safely be taken as expressing what the Hindu Law, as accepted by the School of Benares, is on this subject. The difficulty is enhanced by the fact that the texts and passages are in Sanskrit, and that some Sanskrit scholars are of opinion that the earlier translations into English of some of those texts and passages are incorrect and are in fact misleading.

In dealing with the question as to whether those texts and passages in Sanskrit have been incorrectly translated, I must say at once that I am entirely ignorant of Sanskrit; but having to express an opinion on the subject I must do so, having formed it as best I could upon the apparent reasonableness or unreasonableness of the criticisms of those competent to make them.

Briefly stated, the contention on the question as to whether the adoption in this case is null and void are as follows:—On the one side it is said that the giving and receiving in adoption in the dattaka form of an only son are absolutely and imperatively prohibited by the Hindu Law, and consequently that such an adoption would be void *ab initio* and the principle *quod fieri non debuit factum valet* could not be applied to such an adoption. We all are agreed that if the adoption of an only son in the dattaka form is according to Hindu Law void *ab initio*, the principle expressed by that maxim cannot be applied.

On the other side it is said that the adoption of an only son is not absolutely or imperatively prohibited by the Hindu Law, and that the reliable texts of that law express only a religious recommendation, and not an imperative prohibition, against the adoption of an only son, and consequently, although the making of such an adoption would be sinful, it would not be void, and the principle *quod fieri non debuit factum valet* would apply, and the adoption once made would be valid. We all are agreed that, if such an adoption is merely sinful and not void *ab initio*, that maxim applies.

It is beyond doubt that the Code of Manu, in which adoption is treated of and recommended in the case of a sonless Hindu, does not contain any prohibition or recommendation against the adoption of an only son. So far as I have been able to ascertain, it is nowhere said in express language in any of the books of the sacred law of the Hindus or in any of the Hindu commentaries that the adoption of an only son is void.

The earliest text upon which this contention, which we have to consider, has arisen in one of Vasistha. It is mainly on that text, or, more correctly speaking, as I hope to show, on a part only of it, and partly on a text of Saunaka, that those Hindu commentators who have regarded the adoption of an only son as imperatively prohibited, have relied.

As translated in Colebrook's Digest, Vol. 2, page 387, Vasistha's text is, so far as is material, as follows, 'A son formed of seminal fluids, and of blood proceeds from his father and mother

1892

BENI PRASAD

v.
HARDAY
EIBI.

1892

BENI PRASAD

v.

HARDAY
BIBI.

'as an effect from its cause; both parents have power, *for just reasons*, to give, to sell, or to desert him; but let no man give or accept an only son, since he must remain to raise up a progeny *for the obsequies of* ancestors. Nor let a woman give or accept a son, unless with the assent of her lord,' &c. That text of Vasistha is thus translated by Mr. Mandlik at page 499 of his Vyavahara Mayukha of 1880 (which I shall hereafter refer to as Mandlik's Hindu Law) thus, 'man produced from virile seed and uterine blood proceeds from his father and his mother as an effect [from its cause]. Therefore his father and mother have power to give, to sell, or to abandon their son. But no one should give or receive an only son, for he saves the man [from *put* or *hell*].' Except in so far as Mr. Colebrooke has interpolated the words "*for just reason*" in his translation, the two translations, although differing slightly in the words used, appear to me to convey the same meaning.

The question is how is the text of Vasistha to be construed. It must clearly be construed according to the rules for the construction of the texts of the sacred books of the Hindu Law if authoritative rules on the subject exist. That rules for the construction of the sacred texts and law of the Hindus do exist cannot be disputed, although those rules have been frequently overlooked or not referred to by Judges or English text writers, probably because they are in Sanskrit and have, so far as I am aware; not yet been translated. That they are rules of the highest authority is obvious from the manner in which they have been referred to by Mr. Colebrooke. Mr. Mandlik also vouches for them and so does Golapchandra Sarkar in his Hindu Law of Adoption. (Tagore Law Lectures of 1888). Those rules of construction are to be found in the Mimansa of Jaimini. Jaimini, as we have been informed by counsel in the course of the argument, lived in the thirteenth century of the Christian era. He was consequently subsequent in date to the Mitakshara and anterior in date to the Dattaka Mimansa and the Dattaka Chandrika, a fact which in my opinion has some bearing on the question which we have to consider, particularly

if we find that those rules are consistent with the construction put by the author of the *Mitakshara* upon the text of *Vasistha*, and that in commenting upon that text the authors of the *Dattaka Mimansa* and the *Dattaka Chandrika* ignored the rule of the *Mimansa* of *Jaimini* which is applicable to it. Let us see what was Mr. Colebrooke's opinion of the *Mimansa* of *Jaimini*. It is to be found in the *Transactions of the Royal Asiatic Society*, volume I, page 457. As I have not a copy of the *Transactions* before me, I shall quote the passage from them which is set out at page 74 of *Golapchandra Sarkar's Hindu Law of Adoption*. As to the *Mimansa* philosophy of *Jaimini*, Mr. Colebrooke said—

1892
BENI PRASAD
v.
HARDAI
BIBI.

‘The disquisitions of the *Mimansa* bear, therefore, a certain resemblance to juridical questions, and, in fact, the Hindu law being blended with the religion of the people, the same modes of reasoning are applicable, and are applied to the one as to the other. The logic of the *Mimansa* is the logic of the law; the rule of interpretation of civil and religious ordinances. Each case is examined and determined upon general principles; and from the cases decided the principles may be collected. A well ordered arrangement of them would constitute the philosophy of law: and this is, in truth, what has been attempted in the *Mimansa* Instances of the application of reasoning, as taught in the *Mimansa*, to the discussion and determination of juridical questions, may be seen in two treatises on the Law of Inheritance, translated by myself, and as many on Adoption, by a member of this Society, Mr. Sutherland. (See *Mitakshara* on Inheritance, 1, 1, 10 and 1, 9, 11, and 2, 1, 34; *Jimuta Vahana* 11, 5, 16-19. *Datt. Mim*—on Adoption 1, 35-41 and 4, 65-66 and 6, 27-31. *Datt. Chand* 1, 24 and 2, 4)’ *Golapchandra Sarkar* in his *Hindu Law of Adoption*, page 74, gives much useful information as to the *Mimansa* of *Jaimini* and also as to the *Vedanta*. He there says, ‘*Mimansa*, however, is the name of a School of Hindu philosophy founded by *Jaimini*, the object of which is to establish the cogency of precepts contained in the Scripture, and to furnish maxims of interpretation, by means of the rules of reasoning.’

1892
BENI PRASAD
v.
HARDAI
BIBI.

And further on at page 74 he says, 'The Vedanta School of philosophy, the founder of which is Vyása, is also denominated Mimansa, and in order to distinguish it from Jaimini's philosophy, the Vedanta is called the Uttara or posterior Mimansa; and the other, the Purva or prior Mimansa. This division is similar to that between the Vedas and the Upanishads and based upon the same principle: the Mimansa of Jaimini deals with the practical or ceremonial precepts; whereas that of Vyása relates to the theoretical or theological precepts contained in the Upanishads. But as the school founded by Vyása has a distinct name of its own, the word Mimansa when used without qualification means Jaimini's philosophy. The later Mimansa is supplementary to the prior; and they are parts of one whole. The two together comprise the complete system of interpretation of the precepts and doctrines of the Scriptures, both practical and theological. The rules furnished by them are followed by the commentators as authoritative while discussing doubtful questions of law.' I have referred thus at length, by giving the above quotations, to the Mimansa of Jaimini or the Purva Mimansa, as it is desirable to keep in mind that the rules of the Purva Mimansa, although they may sometimes have been overlooked or not attended to by Hindu as well as English commentators and text writers and by English translators, are no new rules of construction but are authoritative rules for the construction of texts of the sacred law of the Hindus.

We have been referred in the course of the argument in this case to the Mimansa of Jaimini, which, as I have said, is in Sanskrit. So far as I could judge from the translation made during the argument, Mr. Mandlik has correctly given the effect of the rule at page 499 of his Hindu Law in the passage which I shall now quote.

After giving his translation of the text of Vasistha, which I have already quoted, Mr. Mandlik says—'This text on the most approved principles of criticism must also be treated as a recommendatory one, inasmuch as it contains a precept that is intended

'for a certain specified purpose. It is a rule of the Purva Mimansa that all texts supported by the assigning of a reason are to be deemed not as *vidhi* but simply as *artha-vāda*, (recommendatory.) When a text is treated as an *artha-vāda*, it follows that it has no obligatory force whatever. Sabara Svāmin constructs an *adhikarana* (a topic) on this head, which he calls *hetumannigadādhikarana* (a topic in regard to texts which contain a clause containing the reason of the precept) out of five *sūtras* of Jaimini, &c.'

1892

BENI PRASAD

v.

HARDAY

BIBL.

Page 500 and the following pages of Mr. Mandlik's book contain much valuable matter bearing on the subject, and the question as to the legality of the adoption of an only son.

Applying the rule of construction of the Mimansa of Jaimini to the text of Vasistha, I am of opinion that that text, so far as it applies to the adoption of an only son, is to be constructed as a religious recommendation and not as a positive and imperative prohibition, as we find the reason given in the text for the precept.

If the continuation of the text of Vasistha which I have been considering is correctly translated by Mr. Colebrooke as 'nor let a woman give or accept a son, unless with the assent of her lord' or if the more correct translation is 'a woman *shall* not give or accept a son except with the assent of her husband' it is to be noticed that according to the rule of construction to which I have referred the text as to a woman not giving or taking a son in adoption gives no reason for that precept, and hence that precept might be construed as a positive and imperative prohibition against a widow adopting a son to her deceased husband without authority from him, as it has been construed by this Court in *Tulsi Ram v. Behari Lal* (1). In that case I declined to express any opinion on the question as to the legality of the adoption of an only son.

Besides the consideration to which I have already referred, there are other considerations, apart from those which may be gathered from judicial decisions to which I shall now refer, which

1892

BENI PRASAD
v.
HARDAT
BIBI.

also lead me to the conclusion that the text of Vasistha must be regarded as containing a religious recommendation only, and not an imperative prohibition.

According to Mr. Mandlik 'Manu is the oldest lawgiver of the Indian Aryas. His mention by the Sruti is evidence of his antiquity. From the Vedas down to the Puranas, Manu and his Dharmasastra are always appealed to as the chief guides.' (Hindu Law by V.N. Mandlik, introduction, p. XLVI.) According to Mr. Mayne, 'The Code of Manu has always been treated by Hindu sages and commentators, from the earliest times, as being of paramount authority; an opinion, however, which does not prevent them from treating it as obsolete whenever occasion requires' (Mayne's Hindu Law and Usage, 3rd edition, paragraph 20.)

The Code of Manu which has come down to us is one of great antiquity. I am not aware that any authority has placed it later than the year 200 B. C. Manu, if he was not a Mythological being but a man who actually existed, may have lived at any time prior to the year 200 B. C. and as far back as, if not further back than, the time of Moses of the Hebrews.

It is impossible to be certain now to what extent the Code of Manu, as we have it, is an abridgment of the original, or whether those texts which it now contains are exactly as they were when it was first promulgated; but of its antiquity and of its pre-eminent authority amongst the Hindus there can be no doubt. It appears to me that sitting here as a Judge to decide a question of Hindu Law, it is not for me to consider whether Manu was a mythological or a real being, and that I must, as far as possible, approach the subject with which we have to deal in the frame of mind of an orthodox Hindu.

According to Manu himself, he was a son of Brahma, and received from Brahma the Code which he communicated to the ten sages, by one of whom, Bhrgu, it was recited and handed down to posterity. Mr. Mandlik is of opinion that a considerable time must have elapsed between Manu and his compiler, Bhrgu. According

to the Hindus, Manu was the first and principal of the Rishis or sages and lawgivers who composed the Smritis, which are believed to contain the precepts of the Divinity as handed down by memory and tradition and recorded from the recollection of the sages. The Smritis are not supposed to contain the *ipsissima verba* of the Divinity as directly imparted by the Divinity to the Rishis, but those words as they were remembered and handed down by tradition.

1892
BENI PRASAD
v.
HARDAI
BIBL.

Whether the Code of Manu was the result of divine inspiration to him, or was the record of tradition, or was partly one and partly the other, intermixed or not with precepts originated by himself, or whether it is or is not now as it originally was, it is most remarkable that although it deals with the subject of adoption, it contains no prohibition against the adoption of an only son, and that so far as has been suggested in argument before us or I have been able to ascertain, such prohibition, if on the true construction of the text of Vasistha such text is a prohibition, appears first in that text of Vasistha. If the Code of Manu, as we now have it, is in an abridged form, it is to the highest degree improbable that those who abridged the original Code would have left out a portion of the original text containing a prohibition so important to the souls of Hindus from the point of view of those who contend that the adoption of an only son is void, if such a prohibition in fact was to be found there. By those who contend that such an adoption is void, it is not suggested that the imperative prohibition, if there is one, is the result of any custom which grew up after the time of Manu, but it is insisted that it is and has always been a vital and fundamental principle of the Hindu sacred law, any infraction of which carries with it the terrible consequences of depriving not only the giver and the acceptor of the only son in adoption, but the souls of their respective ancestors of all means of attaining to the ultimate heaven of the Hindus. So far as I can ascertain, there is nothing in Vasistha, the Mitakshara or elsewhere to indicate that the Code of Manu ever contained any such prohibition. It is difficult to understand that Manu when recommending and authorising adoption should have omitted any

1892

BENI PRASAD
v.
HARDAY
Bibi.

reference to a prohibition to the adoption of an only son if according to the Divine law, as revealed or known to him, such an adoption was illegal and fraught with such momentous consequence to the souls of Hindus as it is contended it has. Vasistha does not appear to have been a contemporary of Manu, who is frequently quoted by Vasistha. Mr. Mandlik is of opinion, and apparently on good grounds, that the Smriti or Vasistha is very ancient and was composed before the compilation by Bhrigu of the present Code of Manu. (Mandlik's Hindu Law, pages 328 and 329.) If that view be correct it is still more difficult to understand why, on the assumption that the text of Vasistha contains a positive and imperative prohibition against the adoption of an only son, the compilation by Bhrigu of the Code of Manu should contain no reference to what would be and must then have been known to be a fundamental prohibition of the Hindu divine law. The Smriti of Vasistha was known to Bhrigu (see Mandlik's Hindu Law, page 329). The only conclusion to which I can come is that the original texts of Manu did not contain any prohibition against the adoption of an only son, and that no such prohibition had been revealed to or was known to him.

Vasistha undoubtedly was one of the Rishis, and his texts are of very great authority as presenting divine precepts recorded from memory or tradition, but in the words of Vasistha, and not in the actual words of the Divinity.

Having regard to the fact that Manu nowhere records any prohibition against the adoption of an only son, and that if such a prohibition existed it must, from the consequences which would follow from the infraction of it, have been a vital and fundamental prohibition of the divine law of the Hindus, I am further led to conclude that the text of Vasistha must be construed as a religious recommendation and not as a positive and imperative prohibition.

I am well aware that the later Smritis contain texts which do not appear in earlier Smritis, and that the Hindu sacred law has developed in the course of ages, partly no doubt the result of customs which sprang up and partly due to the introduction of texts by the

Rishis and to glosses and interpolations of Hindu commentators which have been accepted by the Hindus as authoritative and correct. Such glosses and interpolations must not be lost sight of when one is attempting to construe ancient texts, and I shall consider them later on. One of the lower Rishis was Saunaka. He is not referred to by the author of the Mitakshara on the question of adoption. The author of the Mitakshara bases his commentary, so far as this question of adoption is concerned, on the text of Vasistha. I think that fact is of importance, as there is no more authoritative commentary than the Mitakshara recognised by the School of Benares.

1892
BENI PRASAD
v.
HARDAY
BIBL.

Mr. Sutherland translates the text of Saunaka thus :—"By no man having an only son (*eka-putra*), is the gift of a son to be ever made. By a man having several sons (*bahu-putra*), such gift is to be made, on account of difficulty (*prayatnata*)."

That translation is to be found in Mr. Sutherland's translation of Section IV, paragraph 1 of the Dattaka Mimansa at page 571 of Stokes's Hindu Law Books.

Mr. Mandlik's translation of and his comments on the texts of Saunaka are to be found at pages 497, 498 and 499 of his Hindu Law. His translation is as follows :—"One having an only son should never give him in adoption ; one having several sons should give a son (in adoption) with every effort."

Mr. Mandlik points out that the Sanskrit word which he has translated in both instances in that text as "should" is capable of meaning "should be done," "must be done" or is "proper to be done," and he points out that if that Sanskrit word means "must" in that portion of the same text which relates to the adoption of an only son, it ought to read as "must" in that portion of the same text which relates to a man having several sons. It has never been suggested, so far as I am aware, that the Hindu Law imposes any imperative duty on a father to give one of his sons in adoption. Mr. Mandlik at pages 498 and 499 adduces a further and apparently a strong argument to show that Saunaka himself regarded the precept as to the adoption of an only son as purely directory.

1892
 BENI PRASAD
 v
 HARDAI
 BIBI.

Golapchandra Sarkar in his Hindu Law of Adoption at page 285 has made some valuable comments on the meaning which, according to the author of the Dayabagha, attaches to the Sanskrit word which Mr. Mandlik has translated as "should" in the text of Saunaka.

I next come to the commentary known as the Mitakshara, which according to Mr. Mayne, following West and Bühler (Mayne's Hindu Law and Usage, 3rd edition, paragraph 26) was written about the latter part of the eleventh century, and consequently many centuries before the appearance of the Dattaka Mimansa of Nanda Pandita.

Mr. Colebrooke's translation of the passages in the Mitakshara bearing on this question is as follows:—"10. By specifying distress, it is intimated that the son should not be given unless there be distress. This prohibition regards the giver (not the taker). 11. So an only son must not be given (nor accepted)." For *Vasist'ha* ordains, "Let no man give or accept an only son." "12. Nor, though a numerous progeny exist, should an eldest son be given;" &c. The words in parenthesis were incorporated by Mr. Colebrooke from Balam-bhatta's commentary. Now the author of the commentary known as Balam-bhatta's, who has frequently been assumed to have been a man and a Pandit, was in fact a lady of Benares of modern times, whose commentary, although it has frequently been mentioned in the course of arguments in cases before me in this Court, has never been relied upon in those cases by any counsel or vakil as of any authority in these provinces, in which the Benares School of Hindu Law prevails. The Sanskrit words "*na deyah*," which Mr. Colebrooke in passage 11 has translated as "must not," have been translated by him in passages 10 and 12, that is, in the prior and subsequent passages of the group, as "should not" in one case and as "nor should" in the other. Unless Mr. Colebrooke, as is suggested by Golapchandra Sarkar at page 288 of his Hindu Law, was influenced by the gloss in Balam-bhatta's commentary, it is difficult to understand why in his translation he introduced an

important interpolation and translated "*na deyah*" as "must not," in passage 11, particularly when, as has been admitted by the learned counsel for the appellant, who is familiar with Sanskrit, the word in Sanskrit which Mr. Colebrooke translates in passage 11 as "so" means "similarly." Passage 12 commences with the same Sanskrit word, but Mr. Colebrooke in his translation of passage 12 has certainly failed to give effect to it. Golapchandra Sarkar at page 286 of his Hindu Law of Adoption gives the translation of those three passages thus:—"By specifying distress it is intimated that the son should not be given unless there be distress. This prohibition regards the giver. Similarly, an only son should not be given." For Vasistha ordains, "let no man give or accept an only son." Similarly, though more than one son exist, the first-born son should not be given, for he chiefly fulfils the office of a son, as is shown by the following text of Manu, "By the first born son, as soon as born, a man becomes the father of male issue."

1892
BENI PRASAD
v.
HARDAY
BIBI.

It will be noticed that although the author of the Mitakshara cites only a portion of the particular text of Vasistha, omitting that portion of the text which gave the reason for the precept, his use of the word which as translated means "similarly" and his use in all three passages of the words "*na deyah*" show, when one examines the second of the three passages in conjunction with the first of them, that he construed the text of Vasistha as the rules of the Mimansa of Jaimini require it to be construed, and read the text of Vasistha as giving a religious recommendation only and not as imposing an imperative prohibition against the adoption of an only son.

The only justification which I can conceive for translating "*na deyah*" as "must not" in that passage in the Mitakshara would have been the finding that the actual text of the Mitakshara imperatively forbade the *accepting* as well as the *giving* of an only son in adoption; but it does not, nor, as I understand it, does it even imperatively forbid the *giving* of an only son in adoption.

The Hindu Law must, so far as it depends on its written law, with which alone we have to do in this reference, be ascertained

1892

BENI PRASAD
v.
HARDAI
Bibi.

from a consideration of the text of that law and of the authoritative commentaries, and not by attempting to construe the mistaken and misleading translations or unauthorised interpolations of English translators, otherwise the sacred law of the Hindus would be the law of the English translators and not the law as contained in the sacred books or authoritative Hindu commentaries. Neither a Judge nor a translator has any authority to make Hindu sacred law. The very idea is ridiculous. The duty of the one is to translate correctly, with power to make such separate comments on the text as he thinks fit, the duty of the other is to interpret the texts or correct translations of them to the best of his ability. Shortly after I took my seat in this Court, the late Pandit Ajudhia Nath, who was one of the ablest and most accomplished lawyers who has practised in this Court in my time, and who had made the study of the Hindu Law a speciality, told me, in conversation and without reference to any particular case, that in his earlier days in the profession, he had, from trusting to judicial decisions, English translations and English text writers, formed very incorrect views on many points of Hindu Law, which were only removed when he later applied himself to a consideration of the original texts.

The opinions and arguments of Golapchandra Sarkar, at pages 286, 287, 288 and 289 of his Hindu Law of Adoption, as to what is the correct translation of the three passages in the Mitakshara, to which I have referred, are instructive and should be read carefully.

I entirely agree with Golapchandra Sarkar (page 289) that in considering Hindu Law—"It should be borne in mind that a transaction may be perfectly valid in law, however blameable, reprehensible or sinful it may be represented." It is perfectly true, as pointed out in the note (b) at page 915 of West and Bühler's Hindu Law, 3rd edition, that "It is not opposed to Hindu notions that a man should benefit spiritually by moving another to an act which in him is sinful." The importance of that fact in determining the question as to whether, according to the text of Vasistha or the Mitakshara, the adoption of an only son is void, is shown by the attempts which have

been made to read those texts as if they not only prohibited the *giving* but also the *accepting* of an only son in adoption.

1892

BENI PRASAD

v.
HARDAY
BIBI.

The importance of ascertaining and attending to the correct translation of the passage in the Mitakshara cannot be exaggerated, and I hope to show later on, when I come to deal with judicial decisions on this important question, that Markby, J., in Calcutta, Westropp, C. J., in Bombay, and Turner, J., in these provinces, were very materially influenced by what I believe to be the incorrect and misleading translation by Mr. Colebrooke of the passage in the Mitakshara to which I have referred.

In my opinion the Mitakshara correctly translated leaves the text of Vasistha as it stood, and having regard to that text and to the preceding and succeeding passages in the Mitakshara, the inference is that the author of the Mitakshara did not understand that the adoption of an only son was imperatively prohibited by the text in Vasistha or by the Hindu sacred law as he knew it, but understood the contrary.

I now pass on to the Dattaka Mimansa of Nanda Pandita. Referring to that commentary and to the Dattaka Chandrika, Mr. Mayne says—"The two special works on adoption, *vis.*, the Dattaka Chandrika and the Dattaka Mimansa, possess at present an authority over other works on the same subject which is, perhaps, attributable to the fact that they became early accessible to English lawyers and Judges from being translated by Mr. Sutherland." I have quoted from paragraph 30 of Mayne's Hindu Law and Usage, 3rd edition. The whole paragraph is worthy of attention when one is considering the authority of either of the commentaries to which Mr. Mayne is referring.

Their Lordships of the Privy Council in *The Collector of Madura v. Mootoo Ramalinga Selupathy* (1) appear to have referred in guarded language at page 437 of the report to the authority of the Dattaka Mimansa and the Dattaka Chandrika, and again at page 438 to the authority of the Dattaka Mimansa.

1892

BENI PRASAD
v.
HABIDA
BIBI.

The comments of Golapchandra Sarkar on the Dattaka Mimansa and the Dattaka Chandrika (Hindu Law of Adoption, pages 120 to 125 inclusive) deserve careful perusal; for not only do they afford ground to doubt that any special authority should be attached to the Dattaka Mimansa, but they afford ground for doubting that the Dattaka Chandrika may not have been a forgery. See the representation as to authorship made by the author of the Dattaka Chandrika in verse 2 of section 1 of that treatise.

The Dattaka Mimansa came into existence within the last three hundred years, and is no doubt on some questions considered as a high authority in the School of Benares, but not on any question of the weight which is attached to the Mitakshara. In my opinion it puts upon the text of Vasistha a construction at variance with that which is put upon it by the author of the Mitakshara and which is not justified by the rule of the Mimansa of Jainini. The importance of the Dattaka Mimansa to my mind on the question with which we are concerned consists in this, that it and the Dattaka Chandrika most materially influenced, and I might even say biassed, the judgment of Mitter and Jackson, JJ., in *Upendra Lal Roy v. Srinati Rani Prasanna Mayi*. (1) The Dattaka Mimansa, the Dattaka Chandrika, and Mr. Colobrooke's translation of the text of the Mitakshara to which I have referred together with the judgment of Mitter, J., in 1 Beng. L. R., 221, appear to have had the same effect upon the judgment of Markby, J., and Garth, C. J., in *Manick Chunder Dutt v. Bhuggobutty Dossee* (2) and not to have been without considerable influence on Westropp, C. J., in *Lakshmappa v. Ramava*. (3).

In the judgment of Mitter, J., at pages 223 and 224 of 1 Beng. L. R. is given what purports, as I infer from the footnotes of reference, to be a translation of verses 1, 3 and 4 of section 4 of the Dattaka Mimansa. Where Mitter, J., got that translation from I have been unable to ascertain, unless it was his own condensation of the translation of Mr. Sutherland. I give in full the passage as it appears in his judgment. It is as follows:—"By no man having an only

(1) 1 B. L. R., A. C., 221.

(2) I. L. R., 3 Calc., 443.

(3) 12 Bom., H. C. Rep., 364.

“son (*eka-putra*) is the gift of a son to be ever made” (verse 1). “He who has an only son, or one having an only son, the gift of that son must never be made.” For as Vasistha declares, “an only son let no man give.” Therefore a prohibition against acceptance is established by the text in question. Accordingly Vasistha says “let no man give or accept,” &c. (verse 3).

1892
BENI PRASAD
v.
HARDAI
BIBL.

“To this he subjoins a reason. ‘For he is destined to continue the line of his ancestors.’ His being intended for lineage being thus ordained : in the gift of an only son, the offence of extinction of lineage is implied. Now, this is incurred by the giver and the receiver also (verse 4).”

Mr. Sutherland’s translation (Stokes’s Hindu Law Books, pages 571 and 572) of verses 1, 2, 3 and 4, of section 4 of the Dattaka Mimansa is as follows :—

“1. Next, in reply to the question, as to the qualification of the person to be affiliated, Caunaka declares : ‘By no man having an only son (*eka-putra*), is the gift of a son to be ever made. By a man having several sons (*bahu-putra*), such gift is to be made, on account of difficulty (*prayatnatas*).’”

“2. He, who has one son only, is ‘*eka-putra*,’ or one having an only son : by such a one, the gift of that one son must not be made ; for a text of Vasistha declares, ‘an only son, let no man give,’ &c.”

“3. Since the word ‘gift’ means the establishing another’s property after the previous extinction of one’s own : and another’s property cannot be established without his acceptance : the author (Caunaka) implies this also, in his text in question. Therefore a prohibition likewise against acceptance is established by that very text. Accordingly Vasistha says : ‘an only son let no man give or accept, &c., &c.’”

“4. To this he subjoins a reason, ‘for he is [destined] to continue the line of his ancestors.’” “His being intended for lineage, being thus ordained : in the gift of an only son, the offence of extinction of lineage is implied. Now, this incurred by both

1892

H. PRASAD

v.
HARDAY
BIBI.

"the giver and adopter also. For the [reason in question,] is sub-joined, after both (verbs: *viz.*, 'give' and 'accept')."

It will be noticed that the author of the Dattaka Mimamsa not only goes far beyond the author of the Mitakshara and treats the text of Vasistha as imposing an imperative prohibition against the adoption of an only son, but in construing that text of Vasistha ignores the rule of the Mimamsa of Jaimini as to construction, to which I have referred, and that notwithstanding that in other cases according to Mr. Colebrooke he had followed rules of construction of the Mimamsa of Jaimini. The author of the Dattaka Mimamsa also, it is to be noticed, relies on this question of adoption on Saunaka, whom on that question the author of the Mitakshara ignores.

Mr. Sutherland's Preface to his translation of the Dattaka Mimamsa and the Dattaka Chandrika should be carefully read by those who are disposed to attach great importance to those commentaries.

That Preface shows further that Mr. Sutherland thought that in translating the Dattaka Chandrika he was translating a work by Devanda Bhatta, who was the author of the Smriti Chandrika. On this latter point also it is advisable to consult paragraph 30 of Mayne's Hindu Law and Usage, 3rd edition.

It is not to be assumed that the whole of a commentary is to be relied upon, because it is found that in some parts it is consistent with the practices of the Hindus or the texts of the sacred books and to that extent has been considered as authoritative. The work of the wildest and most inaccurate reasoner on sacred texts would probably be found to be on many points in accord with the popular views, with some texts which he quoted, and with some of the opinions of other commentators.

The translation relied upon in the same judgment of Mitter, J., of the passage in the Dattaka Chandrika is, "By no man having an only son is the gift of a son to be ever made" (sec. 1, verse 29).

Mr. Sutherland's translation of that verse (Stokes's Books of Hindu Law, page 636) is as follows:—"In answer to the question—

‘by whom is a son to be given?’ Caunaka declares—‘By no mans, 1892
 ‘having an only son is the gift of a son to be ever made. By a BENI PRASAD
 ‘man having several sons, such gift is to be anxiously made.’ ”
 v.
 HARDAI
 BIBI.

This shows that the author of the Dattaka Chandrika was making his comment not upon Vasistha, but upon the text of Saunaka, to which I have already referred. It is to be observed that neither the text of Vasistha nor that of Saunaka says that the gift of an only son is an offence which will cause an extinction of lineage in either the giver or the receiver, and that that gloss was first put upon Vasistha's text by the author of the Dattaka Mimansa.

According to Jagannatha and others the adoption of an only son is not imperatively prohibited, and the texts relating to the adoption of an only son are to be read as containing a religious recommendation only.

As to the process of reasoning by which, apart from the gloss of the Dattaka Mimansa, it has been contended that on the adoption of an only son the lineage of the giver and the acceptor must become extinct, I shall next deal. Before proceeding to consider the more important judicial decisions on this question of the legality of the adoption of an only son, I wish to point out that, as it appears to me, much of the argument according to which such an adoption must be considered as imperatively prohibited is of that kind of argument known as the argument in a circle. It is said, “such an adoption is illegal because it deprives the giver and the receiver of lineage, or in other words of descendants of offer the funeral cake,” &c. When the question is asked, “Why should “not the giver of an only son be on the making of the gift in the “position of a sonless Hindu and therefore competent to adopt a “son to himself,” the answer is, “Because the giving in adoption of “an only son is illegal according to Hindu Law and one who commits “such an infraction of the Hindu Law must be incompetent to adopt “a son.” When the question is put, “Even if the giver of an only son becomes thereby precluded from all chance of lineage by adoption or by subsequent procreation, why does not the only son given in

1892

ENI PRASAD

v

HARDAI
BIBI.

adoption become a son to the acceptor," the answer is, "Because such an adoption is illegal according to Hindu Law and therefore void." When I put the question, "Then if the adoption is void why does not the only son continue to be for all purposes the son of his natural father?" the only answer I received was, "the natural father had committed an act so sinful and illegal that he thereby lost his son." Whether or not it is considered that such a penalty is a just one upon the natural father, it appears to me that if such a view of the Hindu Law be correct, a very unjust measure would be meted out to the unfortunate only son, who, by reason of his age at the time generally prescribed for an adoption, must be considered as an innocent and unoffending party, who had no voice in the transaction, and still harder would be the fate of the souls of those of the ancestors who died prior to such an adoption and who consequently could have had no voice in the matter of the adoption. The adopted son would according to such an argument have lost one father without gaining another. If I were one of the Judges who will have to decide this appeal after this reference to the Full Bench is answered, I would, before deciding against the legality of the adoption of the respondent, Ram Prasad, enquire whether he Musammat Hardai Bibi, and his natural father, had been outcasted on account of the adoption of Ram Prasad. I believe it is over twenty years since the adoption took place. If those persons were not outcasted I should require to have explained to me how it happened, if the adoption was such a sinful and illegal act in the eyes of the Hindu Law, they were not outcasted, particularly as they belong to a caste, the members of which are such sticklers for caste and for keeping their caste pure as the Agarwala Banias of Benares, where the principles of the Benares School of Hindu Law are supposed to be understood and followed.

I now proceed to consider the later leading judicial decisions in India on this question. I do not propose to offer any separate criticisms on the earlier judicial decisions which are referred to in the later cases, because, owing to the incomplete condition of this Court's Library, there are few of those earlier decisions to which I have

access, and it might lead to a wrong impression as to my views and method of dealing with the subject if I were to criticise some only of the earlier decisions and pass orders of them by in silence.

The first decision to which I shall refer is that in *Upendra Lal Roy v. Srimati Rani Prasanna Mayi* (1). That decision, as I have already pointed out, is almost, if not entirely, based on the passages from the Dattaka Mimansa and the Dattaka Chandrika, referred to in the judgment in that case. It was asserted in the judgment of Mitter, J., in that case "that the adoption of an only son is prohibited by the Hindu Shastras, is beyond 'all controversy.'" In support of that assertion none of the Hindu Shastras are cited, but what are apparently incomplete translations of passages from the Dattaka Mimansa and the Dattaka Chandrika are given. Manu, as given in the Dattaka Chandrika, is referred to in that judgment in support of what I agree with Markby, J., in considering to be a wholly incorrect proposition as to Hindu Law. I shall refer to this later. Whether or not Mitter and Jackson, JJ., who were without doubt Judges with well-deserved reputations as lawyers, consider that the Dattaka Mimansa and the Dattaka Chandrika were Hindu Shastras may be a doubtful point on a perusal of their judgment. Whatever they took them to be, they accepted their texts, or, more correctly speaking, the translations which they gave of them, as correct expositions of the Hindu Law on the subject of adoption. There is no trace in their judgment of their attention having been drawn to the authoritative rules of construction to be found in the Mimansa of Jaimini, or to the fact that the text, the meaning of which is disputed, first appeared in Vasistha. They saw no distinction in construction between the text which prohibited a woman adopting a son to her husband without his authority and that portion of the text which deals with the adoption of an only son. They said, referring to the passage cited by them from the Dattaka Chandrika as to a woman not adopting to her husband without his assent, "Can it be said that such an adoption would be valid in law? It will be observed that the language employed in the preceding text is

1892

BENI PRASAD

D.
HARDAY
BIBL.

(1) I. B. L. R., 221.

1892

BENI PRASAD
v.
HARDAT
BIBI.

"precisely similar to that employed in the text prohibiting the adoption of an only son." Those learned Judges, if they had paid regard to the rule of the Mimansa of Jaimini and applied it to the full text of Vasistha to which I have referred, could not have made that assertion. If they had had their attention drawn to the three passages in the Mitakshara which are commented on by Golapchandra Sarkar at pages 286 and 287 of his Hindu Law of Adoption, they would probably have come to the conclusion that in the view of the author of the Mitakshara the text of Vasistha relating to the adoption of an only son was one containing a moral or religious recommendation, and not a positive and imperative prohibition which would make such an adoption illegal and void. Those learned Judges nowhere refer to the Mitakshara, possibly because they may not have been aware of the passages in the Mitakshara to which I have referred; but more probably because the Dayabhaga took the place of the Mitakshara in Lower Bengal; but neither do they refer to the Dayabhaga in support of any of the views set forth in their judgment. Possibly the Dayabhaga contained nothing which would support them. Further on in their judgment, referring to the adoption of an only son, they say—"It is to be borne in mind that the prohibition in question is applicable to the giver as well as to the receiver, and 'both parties are threatened with the offence of 'extinction of lineage' 'in case of violation.'" That was, as I think I have shown, nothing but pure and unadulterated Dattaka Mimansa. Those learned Judges also relied upon cases numbered 3 and 18 at pages 178 and 179 of Vol. 2 of Macnaghten's Principles and Precedents of Hindu Law, 3rd edition. The passages printed by Sir William Macnaghten were apparently questions and answers put to and given by a Pandit. In support of the answer in case 3, no authority is cited. In support of the answer in case 18, Vasistha, as interpreted in the Dattaka Mimansa and the Dattaka Chandrika, was relied upon. It would appear from paragraph 30 of Mayne's Hindu Law, 3rd edition, that Sir William Macnaghten, at the date of his work Mr. W. H. Macnaghten, had not a very accurate idea of the authority to be allowed to the Dattaka Mimansa or the Dattaka Chandrika, or a correct opinion as to the authorship of the latter treatise.

I have only one more comment to make on the judgment of Mitter and Jackson, JJ. It is that I entirely agree with Markby, J., (1) in his comment upon the passage in the judgment of Mitter and Jackson, JJ., in which at page 224 they are reported to have said, "An act of adoption is to all intents and purposes a religious act, but one of such a nature that its religious and temporal aspects are wholly inseparable." With that proposition I entirely disagree, and for reasons similar to those given by Markby, J.

1492
BENI PRASAD
v.
HARDAT
BIBI.

I now proceed to consider the judgment of Markby, J., in *Manick Chunder Dutt v. Bhuggobutty Dossee*. (2) Many of the reports referred to in that judgment are not in this Court's Library, and I am consequently unable to test the accuracy of the criticisms passed upon the cases reported in them. I can however point out that Markby, J., in his criticism upon the case of *Musimmat Tikday v. Hurree Lal*, (3) at page 454 of the Report, clearly shows that his mind was influenced by the Dattaka Mimansa. He there said, "The cardinal reason, therefore, why an only son cannot be adopted, namely, that the lineage of his family is thereby extinguished, and the ceremonies can no longer be performed which are necessary for the salvation of his ancestors, does not apply." In that criticism Markby, J., was assuming the correctness of one of the disputed contentions on which he had to decide. It might be asked why, if the giver in adoption of an only son is to be treated as a man who has no son, should his ancestors be in a worse position than they would have been in if he had died without having had a son born to him and without having adopted one, and why should not others, who are authorized according to Hindu Law to perform the ceremonies for a sonless Hindu and his ancestors, perform the ceremonies necessary for the salvation of the souls of the ancestors of a giver in adoption of an only son, or why it should be assumed that subsequently to the adoption the natural father of the adopted son could not have a son born to him, or why the natural father having given his only son in

(1) I. L. R., 3 Calc., at page 458. (2) I. L. R., 3 Calc., 443.

(3) W. R., 1864, Gap. No. 133.

1892 adoption should not, like any other sonless Hindu, be competent to adopt a son.

BENI PRASAD

v.
HARDAI
BIBI.

According to Markby, J., at page 460 of the report, there were only four cases in which it was clear that the point as to the legality of the adoption of an only son arose and was decided, namely, two cases at Calcutta which were against the adoption of an only son, and two cases, one at Madras and the other at Bombay, which supported such an adoption. Of the two cases at Calcutta one was that to which I have already referred, in which Mitter and Jackson, JJ., held that such an adoption was invalid. According to Markby, J., at the same page, five English text-writers thought such an adoption illegal and one "backed no doubt by the important but solitary opinion of Jagannatha amongst Hindu text-writers" thought it valid. In connection with the passage in the judgment of Markby, J., to which I have just referred, I cannot forget the statement of Mr. Mayne in paragraph 30 of his Hindu Law, 3rd edition, that "The two special works on adoption, viz., the Dattaka Chandrika and the Dattaka Mimamsa, possess at present an authority over other works on the same subject, which is, perhaps, attributable to the fact that they became early accessible to English lawyers and Judges from being translated by Mr. Sutherland," and avoid wondering whether the circumstance of their early translation and consequent accessibility to English lawyers and English Judges, coupled with a neglect to observe the rules of construction of the Mimamsa of Jaimini, which, owing to that Mimamsa being in Sanskrit, may have been little, if at all, known to English lawyers and English Judges, may not account for the views expressed in the two judgments and in some of the English text-books upon which Markby, J., partly relied.

The Hindu text-writers upon whom Markby, J., relied were the authors of the Dattaka Mimamsa and the Dattaka Chandrika, although he does also refer to the Mitakshara. In my opinion the Mitakshara does not support his view. In referring to the Mitakshara, Markby, J., did that which Mitter and Jackson, JJ., had omitted to do in their judgment upon which I have commented.

Referring to the Dattaka Mimansa, the Dattaka Chandrika and the Mitakshara, Markby, J., at page 459 of the Report said, "The "authors of these treatises all quote the same text of the sage "Vashishtha, which is the foundation of the whole doctrine." I thoroughly agree with Markby, J., that the doctrine, whichever is the true one, must be deduced from the text of Vasistha, but not from a part only of that text, but from the whole text read together. I, however, thoroughly disagree with him in thinking that the doctrine upon which he relied is to be found in the Mitakshara, or is reasonably to be deduced from the text of Vasistha, construed as I construe it by the rule of the Mimansa of Jaimini.

1892
BENI PRASAD
v.
HARDAY
BIBI.

Markby, J., at page 455 of the report states what I believe, from my experience of old cases, to be a very sound principle. Referring to the opinions given by certain Pandits he said, "But it "does not appear that these opinions were ever submitted to any "Court, nor is it said upon what texts they were based, and I "believe is to be a clear principle, understood and acted upon ever "since our Courts have been established, not to accept as authority "the opinions of Pandita unconfirmed by judicial decision and "unsupported by texts."

I have not had the advantage of seeing the opinions of the Bengal Pandits which Markby, J., states were unanimous, and I do not know what were the texts, if any, which those Pandits gave in support of them. We have, however, been referred in the course of the argument in this case to three opinions of Pandits given in cases in the Sadr Diwani Adalat of these provinces. They are Bywastha No. 9, Bywastha No. 24 and Bywastha No. 25 to be found at pages 6, 16 and 17 of Bywasthas, Vol. I, Part I, published at Agra in 1861. The two latter appear to be those referred to by Westropp, C.J., in his judgment, upon which I shall presently make some comments. The first of those three Bywasthas relates to a question as to the adoption of an only son of a sister. The answer relates to the adoption of an only son and "Bishisht," the Dattaka Chandrika and Dattaka Mimansa are cited as the authorities. The second relates to the adoption of an eldest son, and no authority is

1892
BENI PRASAD
v.
HARDAI
BIBI.

cited. Whilst in the third the Dattaka Chandrika was the only authority given. Whether the latter Pandit was not aware of or did not approve of the Dattaka Mimansa I know not, nor have I been able to trace the cases in which those opinions were given. As Markby, J., was of opinion that there was only one case in the Sadr Diwani Adalat, viz., that of *Nundram v. Kashee Pandey* (1) in which the question as to the legality of the adoption of an only son properly arose and was decided, the opinions of the Pandits in the other cases in the Sadr Diwani Adalat would according to his rule be of little value.

I shall now consider the judgment of Westropp, C. J., in *Lokshammappa v. Ramava*. (2) That was an important judgment for although Westropp, C. J., was not deciding the question as to whether the gift in adoption of an only son by his father was in the Bombay Presidency void, and in fact assumed for the purposes of the suit in its then stage that such an adoption would not be void, and that the texts in relation to it were directory only, and that if such an adoption were made in opposition to those texts the principle *quod fieri non debuit factum valet* should be applied to it (see pages 375 and 391 of the report), yet I think it can be gathered from the judgment that the opinion of Westropp, C. J., was against the validity of such an adoption.

Westropp, C. J., at pages 377 and 378 of the report assumes that Mr. Colebrooke's translation of the three passages in the Mitakshara, to which I have already referred, was correct, and at page 378 lays much stress on the fact that Mr. Colebrooke in rendering those passages, employs with regard to the only son, the expression "must not," and with regard to the eldest son the expression "should not." I have already pointed out that the propriety of Mr. Colebrooke in those passages rendering the same Sanskrit word in two of the passages as "should" and in that relating to the only son as "must" requires explanation. Westropp, C. J., apparently relied to some extent upon the authority of Balambhatta's commentary, the Dattaka Mimansa, the Dattak

(1) 4 Sel., Rep., 70.

(2) 12 Bom., H. C. Rep., 364.

Chandrika and the text in Saunaka (Caunaka) to which I have already referred. Westropp, C.J., then refers at pages 380, 381, 382, 383, 385, 386, 387 and 388 to several reported cases, to only three of which owing to the condition of this Court's Library have I access. Some of those cases were apparently in favour of the adoption of an only son being valid or at least not void. It does not appear whether the Vyavasthas referred to as in Mr. Justice West's MS. were accompanied by texts in support of them or were sanctioned by judicial decision. The two Vyavasthas mentioned at page 391 of the Report as having been given to the Sadr Diwani Adalat of the North-Western Provinces are two of the Bywasthas I have already referred to.

1892
BENI PRASAD
v.
HARDAI
BIBI.

In *Waman Raghupati Bova v. Krishnaji Kashiraj Bova* (1) all that the Full Bench decided is best expressed in their own words which are, "But, although this course may be fairly open to a critic of the decisions of the Court, it is, in our opinion, very important, with a view to uniformity of decisions, that this Court should, in the absence of a very cogent reason to the contrary, not depart from the standard it has uniformly applied in appreciating the value of the different text-writers. Under these circumstances, it is sufficient, in our opinion, to say that the question has been determined by a Full Bench after full discussion against the validity of such an adoption, and that for the last ten years such an adoption has been regarded by the legal profession as being, in the view of this High Court, in contravention of Hindu Law, and that no reason which could properly be entertained, with due regard to the long established authority of Full Bench decisions, has been assigned which could justify our interference with that decision. We must, therefore, answer the question referred in the negative."

The referring judgment of Jardine, J., and the judgment of that Full Bench are, notwithstanding the manner in which that reference was decided, interesting and instructive. The Full Bench decision which the Full Bench in the case in I. L. R., 14 Bom., 249, declined to reconsider is unfortunately not reported, and apparently

(1) I. L. R., 14 Bom., 249.

1892

BENI PRASAD

v

HARDAI
BIBI.

no judgment was written in that Full Bench case, so that it would be mere speculation to consider what were the reasons of the Judges respectively for holding in that case that the adoption of an only son by a Lingayet was invalid. The Judges in that case apparently thought that a custom, if established, amongst Lingayets of making such adoptions would validate such an adoption amongst them. It does seem to me curious how, if the adoption of an only son is so sinful, so absolutely prohibited by the Hindu religion, and so destructive to the souls of Hindus as it is contended that it is, a local custom or a custom amongst particular Hindus could have the effect of overruling and setting aside the divine Hindu Law on so material a point and avoiding the difficulties in which the soul of the giver in adoption of his only son and the souls of his ancestors would otherwise be left.

The latest decision on this question of the adoption of an only son in Madras, of which I am aware, is that in *Narayanamsami v. Kuppusami* (1) In that case Collins, C. J., and Muttusami Ayyar J., said, "We are not prepared to depart from the course of decisions in this Presidency, and we hold then that the adoption of an only son, if actually made, is valid, however sinful the act may be on strict religious considerations." One of the cases to which those learned Judges had referred was *Chinna Ganndan v. Kumara Ganndan* (2) in which Scotland, C. J., had given a judgment which was much criticised by Markby, J., in *Manick Chunder Dutt v. Bhuggobutty Dossee*, (3) and was referred to without criticism by Westropp, C. J., in *Lakshmappa v. Ramara*. (4) I regret to say that I have not access to the reports of the cases upon which Markby, J., founded his criticism of the judgment of Scotland, C. J., and I must only assume that his criticism was correct so far as those cases went. It is however to be observed that Scotland, C. J., also relied upon the Rajá of Tanjore's case.

In the case in the Panjáb of *Adjoodhia Pershad v. Musammat Dewan*, (5) Simson, J., held, agreeing with a previous decision of that

(1) I. L. R., 11 Mad., 43.

(4) 12 Bom., H. C. Rep., A. C., at pp.

(2) 1 Mad., H. C. Rep., 54.

378, 388.

(3) I. L. R., 3 Calc., at p. 455. (5) Panjáb Record, 1870, No. 18. p. 66.

Court, that the adoption of an only son having once been made cannot be annulled, and that the validity of such an adoption depends rather upon local usage than upon the strict rule of Hindu Law upon the subject. In the same case Lindsay, J., held that the texts of Hindu Law relating to the adoption of an only son could not fairly be considered as directory only, and that such an adoption was invalid; but that a custom to make such an adoption having been proved the particular adoption was good, on the ground, as stated by him, that "custom overrules the law."

1892
 BENI PRASAD
 v.
 HARDAI
 BIBI.

I now come to the Full Bench decision of this Court in *Hanuman Tiwari v. Chirai* (1) from which we are asked to dissent. In that case the majority of this Court, Stuart, C. J., Pearson, Spankie, and Oldfield, JJ., held that the adoption of an only son was sinful and blameable only and not void, and that such an adoption having taken place the principle *quod fieri non debuit factum valet* applied, and the adoption could not be disturbed. Of the contrary opinion was Turner, J., who relying upon Mr Colebrooke's translation of the passage in the Mitakshara in which he translates as "must" the same word which in the preceding passage and in the subsequent passage he translates as "should," and also relying upon the Dattaka Mimansa, the Dattaka Chandrika, and Saunaka, held that the adoption of an only son was invalid and that the maxim *quod fieri non debuit factum valet* could not be applied. In conclusion Turner, J., said, "The consequence of the contrary ruling would be, according to Hindu Law, to inflict a penalty not only on the giver and receiver, but on the collaterals of the receiver, whose property might descend to a person solely entitled to claim it on account of benefits he is presumed to confer, but which he could not possibly confer." I think it is obvious that it was the Dattaka Mimansa which was mainly responsible for the conclusion of Turner, J. The criticism on the construction of the original of the passage in Saunaka cited by Turner, J., I have already referred to.

The position of this question as to the legality or illegality of the adoption of an only son stands thus, so far as the latest

(1) I. L. R., 2 All., 164.

1882
 BENI PRASAD
 v.
 HARDAY
 BIBI.

decisions of the four High Courts in India and the Chief Court of the Panjáb are concerned. A Division Bench of the High Court of Calcutta and a Full Bench of the High Court of Bombay have held that such an adoption is illegal and void. A Division Bench of the High Court of Madras has held that though such an adoption is sinful it is not void. A Full Bench of this High Court, Turner, J., dissenting, has held that although such an adoption is sinful, it is not void, and that the principle *quod fieri non debuit factum valet* applies to such an adoption actually made. The Chief Court of the Panjáb holds that such an adoption is valid when a custom to make such an adoption is proved.

The question has never, so far as I am aware, been expressly decided by their Lordships of the Privy Council. But nevertheless there are some indications, slight though they may be, that their Lordships do not consider that the adoption of an only son is plainly void and that the principle *quod fieri non debuit factum valet* could not apply. In *Nilmadhub Doss v. Bissambhar Doss* (1) their Lordships of the Privy Council said, "Again, if there is, on the one hand, a presumption that Gooroooproshad Doss would perform the religious duty of adopting a son, there is, on the other, at least as strong a presumption that Purmanund would not break the law by giving in adoption an eldest or only son, or allowing him to be adopted otherwise than as a *Duyamushyayana*, or son to both his uncle and his natural father. This latter kind of adoption would not sever the connection of the child with his natural family." I infer from the report in 13 Moo. I. A., that Ramlochan Doss, who was alleged by the respondents to have been adopted by Gooroooproshad Doss, was at the time when he was adopted the only then surviving son of his father Purmanund Doss. At page 87 of the report it is stated that Rajiblochan Doss, who was the eldest and the full brother of Ramlochan Doss, was dead at the time of the alleged adoption. He was the eldest son of Purmanund Doss. At page 89 of the report it is stated that "the appellant filed a written statement by way of answer, and stated that Ramlochan Doss was the step-brother of the appellant, and that

(1) 13 Moo. I. A., 85.

"Goorooproshad Doss had never adopted him or performed the
 " *Pootrashee*. (initiatory ceremony of adoption) and that, in fact, BENI PRASAD
 " Ramlochan Doss, at the time of the alleged adoption, was the only
 " son of their father, Purmanund Doss, and that he and his wife
 " did not give in adoption his eldest and only living son," &c. At
 page 93 of the report I find that Sir Roundell Palmer, in arguing
 the case for the appellant, contended that " Ramlochan Doss was
 " not, and indeed could not, have been legally adopted or given,
 " inasmuch as at the time of such alleged adoption he was the
 " only son of his father and, therefore, ineligible," and in support
 of that contention he cited the *Dattaka Chandrika*, sec. 1, pla. 20
 21, 27 (Sutherland's translation), and *Strange's Hindu Law*, Vol. 1,
 85, 2nd edition. I may mention that Sir Barnes Peacock, C. J.,
 and Bayley and Kemp, JJ., had held, but on what finding of facts
 or law I do not know, that the adoption of Ramlochan Doss by
 Goorooproshad Doss did as a fact actually take place, and that it
 was a good and valid adoption. It is obvious from the passage
 which I have quoted from the judgment of their Lordships of the
 Privy Council, that their Lordships were dealing with the case on
 the basis of Ramlochan Doss having been at the date of the
 alleged adoption the only then living son of his father Purmanund
 D. ss. If their Lordships had accepted the contention of Sir
 Roundell Palmer, which I have quoted, it would not have been
 necessary for them to have considered whether the alleged adoption
 had in fact taken place. On the contrary, their Lordships indicated
 plainly that such an adoption, if it had taken place, would not have
 been void, for in pointing out the distinction between the adoption
 alleged and a *Dwyamushyayana* adoption they said, " this latter
 " kind of adoption would not sever the connection of the child
 " with his natural family," and they inferred that if Ramlochan
 Doss' father would have given him in adoption at all, it would
 have been in that form which would not have separated him from
 his natural family. Their Lordships never suggested that if
 Ramlochan Doss had been given in the *dattaka* form the adoption
 would have been void. I am entitled to infer that they did not
 think it would have been.

1892

 v.
 HARBAL
 BIBL.

1892

BENI PRASAD
v.
HARDAY
BIBL.

The only other case from which may be inferred what the opinion of their Lordships of the Privy Council was as to the legality or illegality of an adoption of an only son, of which I am aware, is that of *Srimati Uma Deyi v. Gokoolmund Das Mahapatra*. (1) In that case their Lordships of the Privy Council, referring to a contention at the Bar, said, at page 53 of the report: "It was urged at the Bar that the maxim "*quod fieri non debuit factum valet*, though adopted by the Bengal School, "is not recognised by other schools, and notably by that of Benares. That it is not recognised by those schools in the same degree as in Bengal, is undoubtedly true. But it receives no application except in Lower Bengal is a proposition which is contradicted not only by the passage already cited from Sir William Macnaghten's work, but by decided cases. The High Court of Madras in *Chinna Gaundan v. Kumara Gaundan* (2) and the High Court of Bombay in *Vyankatrao Anandrao Nimbalkar v. Jayavantrao Bin M. Ranadive* (3) acted upon it; and did so in reference to the adoption of an only son of his natural father, on which the High Court of Calcutta in *Opendur Lall Ray v. Rance Broome Moyce* (4) has refused to give effect to it, considering that particular prohibition to be "imperative."

It is obvious from the passage which I have just quoted that their Lordships of the Privy Council were quite alive to the fact that in the Courts in India there was a difference of opinion as to whether the adoption of an only son was void, in which case the maxim *quod fieri non debuit factum valet* could not apply, or such an adoption was merely sinful and not void *ab initio*, in which case that maxim might be applied if such a principle as that expressed in the maxim was recognised by the particular school, and yet their Lordships, although giving those examples of cases in which the maxim had been applied, did not suggest that in those cases that maxim was inapplicable. If the maxim was inapplicable in the cases which their Lordships cited as cases in which the maxim had

(1) L. R., 5 I. A., 40.

(3) 4 Bom., H. C. Rep., A. C., 191.

(2) 1 Mad., H. C. Rep., 54.

(4) 10 W. R., 347.

been applied, I would have expected that their Lordships would have said so and not have left it to be inferred that the propriety of applying the maxim in the cases to which they referred, merely depended on whether the particular school recognised such a maxim or not. It is most improbable that in support of Sir William Macnaghten's opinion, in which apparently they agreed, their Lordships would have referred to cases in which the maxim had been judicially applied, if in their opinion the maxim was inapplicable in those cases, and it must have been inapplicable if the adoption of an only son was void.

I am satisfied that although the giving in adoption of an only son is according to the Hindu Law sinful, and to that extent contrary to the Hindu Law, yet that the adoption of an only son so given is not void, and that the principle of *quod fieri non debuit factum valet* may be and should be applied to such an adoption in these provinces. I may say that before I came to look into this subject in this case I was under the impression based on the judgments of Westropp, C. J., and Turner, J., already referred to that an adoption in the dattaka form of an only son was void. In conclusion, I ought to say that I thoroughly agree with the Full Bench of the High Court of Bombay, that a High Court should not, except for very cogent reason, reconsider or question the ruling of a Full Bench of its own Court. This case is a very fair example of the mischief which may arise from departing from cases fully considered and decided by a Full Bench. The Full Bench decision of this Court in the case of *Hanuman Tiwari v. Chirai* (1) was given as long ago as the 24th of February 1879, and it is impossible to say how many adoptions of only sons may since then have been made in these provinces on the faith of that Full Bench decision and in how many cases the overruling of that decision might affect the rights of persons, who relying upon it deemed themselves secure, effected marriages and dealt with property which came to them as such adopted sons.

My answer to the first question is that the adoption of an only son which has in fact taken place is not null or void under the

(1) I. L. R., 2 All., 164.

1892 Hindu Law applicable in this case. Having answered the first question as I have done, I do not consider it necessary to give any answer to the second or third questions.

BENI PRASAD

v.

HARDAY
BIBI.

STRAIGHT, J.—I have read the learned Chief Justice's judgment, and upon a full consideration of it and of the arguments on either side so much doubt is left in my mind that I am not prepared to depart from the Full Bench ruling of this Court reported in I. L. R., 2 All., 164. Many titles may have been created and many estates have vested on the strength of that ruling, and I do not think that any sufficient grounds have been established for holding it to be wrong. I would therefore answer this reference in the manner indicated by the learned Chief Justice.

MAHMOOD, J.—My task in delivering this judgment is materially diminished in consequence of the advantage which I have had of perusing the judgment which the learned Chief Justice has prepared in this case, and also on account of my having on two previous occasions delivered judgments upon somewhat cognate questions of the law of Hindu adoption. Both the judgments have been printed in the reports, and I may conveniently refer to the pages of the published reports whenever it is necessary to deal with what may be called the preliminary aspects of the question which have been referred to the Full Bench.

The main question as enunciated by Mr. Justice Young and myself, in our order of reference, dated the 10th June 1890, is whether the adoption of an only son having taken place in fact, such adoption is null and void under the Hindu Law.

The learned Chief Justice has pointed out that whilst there is a vast conflict of rulings of the High Court in India, their Lordships of the Privy Council have not yet directly settled the question, and I may say that the latest case before their Lordships, *Sri Anni Devi Goru v. Sri Vikrama Deou*, (1) does not settle the question. In this state of things, and because the learned Chief Justice has already reviewed the various rulings and authorities that were cited, it would be a work of supererogation on my part to do

more than briefly state the reasons why, after much consideration, I have arrived at the same conclusion at which he has done. In doing so I wish to premise at the outset that the parties to this litigation admittedly belong to that wise born caste of *Vaishya*, and that they are governed by the Benares School, or rather sub-division of the *Mitakshara* School, of the Hindu Law. I have mentioned this circumstance because, as appears from my judgment in *Ganga Sahai v. Lekhraj Singh*, (1) the Hindu Law is sub-divided into various schools, and it does not follow that the interpretation of texts adopted by one school is to be necessarily followed by another. I may also add that this is a case of adoption under the *Dattaka* form, and that no question arises directly as to any other form of adoption.

1892
BENI PRASAD
v.
HARDAY
BIBI.

In the case abovementioned after referring to various authorities, I summed up my conclusions in the following words :—

“*First.*—That the existence of male issue being favoured by the Hindu Law *mainly* for the purpose of the parents’ beatitude in the future life, adoption is a sacrament justified by a fiction of law under conditions when the natural male offspring is wanting.

“*Secondly.*—That a *substantial* adherence to ceremonials, but principally the act of giving and taking, is sufficient to establish the adoption.

“*Thirdly.*—That when such adoption has duly taken place, its effect is the affiliation of the boy, as if by a feigned parturition he had been begotten by his adoptive father, thus removing the boy from the family of his natural to that of his adoptive parents.

“*Fourthly.*—That the boy so adopted (to use the words of Jagan Natha) ‘is born again by the rites of initiation, and his relation to the giver ceases and a relation to the adopter commences.’”

I have quoted these conclusions, not only because they still have my approval, but also because they help me in stating the grounds of my judgment. But before proceeding any further I wish to point out that, whilst the first conclusion as enunciated by me does

(1) I. L. R., 9 All., 256, *vide* pp. 288—291.

1892
BENI PRASAD
v.
HARDAI
EIBI.

not limit the motives for adoption to spiritual beatitude of the adoptive father and his ancestors, it does not go the extreme length of holding, what was held by the Calcutta High Court in *Rajendra Narain Lahoree v. Saroda Soonduree Debia*, (1) that a childless Hindu is bound to adopt a son, if at all anxious for his own salvation, that the duty is an imperative one, and what is required to be done for that end is not optional with him. I also wish to observe in passing that my second conclusion as above quoted was carefully worded to prevent any confusion between matters of ceremonial and those of essence in connection with the applicability of the doctrine of *factum valet* as applicable to Hindu adoptions. In the case abovementioned (*vide* I. L. R., 9 All., pp. 292 to 297) I had to consider this question at considerable length, and at pp 296 and 297 of the report I summed up my conclusions upon this point in the following words :—

“Now in the case of adoption there are of course questions of formalities, ceremonies, preference in the matter of selection, and other points, which amount to moral and religious suggestions. Such matters, speaking generally, are dealt with in the texts in a directory manner, relating to what I may perhaps call the *modus operandi* of adoption. To such matters which do not affect the essence of the adoption, the doctrine of *factum valet* would undoubtedly apply upon general grounds of justice, equity, and good conscience, and irrespective of the authority of any text in the Hindu Law itself. There may, indeed, be cases where the express letter of the texts renders that which would in other systems be regarded as a matter of form, a matter of imperative mandate or prohibition affecting the very essence of the transaction. * * * * So also there may, of course, be definite texts of the Hindu Law of Adoption itself which, though relating to matters of form, would be sufficiently imperative to vitiate an adoption in which they have been disregarded. But unless such texts are express and undoubted in their meaning, I would apply the doctrine of *factum valet* to adoptions which, having been made in substantial conformity to the law,

“have infringed only minor matters of form or selection. Having
 “so far explained how I understand the general scope of the doctrine
 “of *factum valet*, I proceed to define upon what points of Hindu
 “adoption I would hold it to be inapplicable. Adoption under the
 “Hindu Law being in the nature of gift, three main matters con-
 “stitute its elements, apart from questions of form. The capacity to
 “give, the capacity to take, and the capacity to be the subject of adop-
 “tion seem to me to be matters essential to the validity of the trans-
 “action, and, as such, beyond the province of the doctrine of *factum*
 “*valet*; and I may at once say that if any of these three capacities
 “is wanting in this case, I shall hold the plaintiff’s adoption to be
 “altogether invalid.”

1892
 BENT PRASAD
 v.
 HARDAT
 BIBI.

I have quoted his passage in order to say that I still adhere to the views which I thus expressed, and also to show that it is in accordance with such views that I shall consider the texts and authorities which have been cited in this case as to the adoption of an only son being void and a nullity. Dealing with the case in this manner, it is obvious that the nature and significance of the authoritative texts assumes great importance, and also the language in which they are expressed. This being so, I wish to excerpt two passages from the most recent writer upon the Hindu Law of adoption, namely, Mr. Golap Chandra Sarkar Sastri, who is known not only to be a competent Sanskrit scholar, but also a trained lawyer, as appears from the lectures which he delivered as Tagore Law Professor in 1888. At page 146 of his work he observes—

“I have already told you that rules of legal and moral obliga-
 “tion have been blended together in the institutes of Hindu Law, and
 “that the parts of them dealing with positive law also contain some
 “rules that appear to be merely admonitory or recommendatory, and
 “not mandatory or imperative. I have also pointed out that the
 “leading commentators themselves draw the distinction and declare
 “of few rules to be of moral obligation only. But at the same time
 “it seems that they have not always kept the distinction in view
 “while discussing the texts of law, so as to point out all the rules
 “are intended to be merely directory, and the Courts of Justice have

1892
BENI PRASAD
v.
HARDAI
BIDL.

“had to consider the question, and have pronounced a few rules to be of that character. * * * * It is now admitted on all hands that there are certain rules which are not legally obligatory ; but the difficult question with respect to this matter is, how are we to differentiate between imperative rules of law and those that are merely binding on the conscience of men? The difficulty is enhanced by the fact that the forms of expression generally used in the Sanskrit books are the same whether legal or moral obligation be intended. So it becomes necessary to consider what principles have been followed by the commentators in declaring a precept to be of no legal force.”

I have been anxious to quote these passages because in the course of the argument it was insisted that none of the three capacities for adoption, which according to my abovementioned views are necessary for the validity of an adoption under the Hindu Law in the Dattaka form, is indispensable for the validity of an adoption already made.

The learned Chief Justice's judgment has relieved me from the necessity of dealing with those various authorities which seem to rely for their interpretation principally, if not wholly, upon early translations made by European scholars of Sanskrit, such as the eminent Colebrooke and Sutherland, to be found in the collected edition of Stokes' Hindu Law books published at Madras in 1865. Since that period three books bearing upon the main question in this case have been written by Sanskritists. The *first* is Mr. Mandlik's excellent edition of the *Vyavahara Mayakha*, published in 1880. The *second* is Dr. Jolly's *History of the Hindu Law of Partition, Inheritance, and Adoption*, which appeared as the Tagore Law Lectures for 1883 and was published in 1835. The *third* is a work on the Hindu Law of Adoption, by Golap Chandra Sarkar Sastri, M.A., B.L., and was published in 1891 as the Tagore Law Lectures for 1888.

It is to these books that I shall principally refer in delivering the rest of my judgment upon the most important question which has to be dealt with in this case.

Mr. Mandlik at page 496 of his valuable work, says—

1892

“The next subject I have to notice is the giving in adoption of an only son. A precept about not giving nor receiving in adoption an only son is found in some of our Smritis. But this, like that about the eldest son, has been always regarded as purely directory, or recommendatory. The usage of adopting such a son has been both ancient and general and has been followed by the preceding Governments as well as by our own. It has been also generally upheld by our Courts.”

BENI PRASAD
v.
HARDAY
LARI.

The learned author then in a footnote (at p. 497) refers to numerous decided cases including the Full Bench ruling of this Court in *Hanuman Tivari v. Chirai*, (1) where it was held that the adoption of an only son cannot, according to Hindu Law, be invalidated after it has once taken place. Whilst citing these cases with approval, the learned author proceeds as a Sanskrit scholar to consider the exact bearing, scope, and effect of the original Sanskrit texts which have been cited in this case for the proposition that the adoption of an only son is absolutely prohibited and therefore void.

I do not propose to enter into any minute discussion as to the various steps of reasoning which fill the next dozen pages of Mr. Mandlik's work, and I think it is enough to say that I accept the authority of such an eminent Sanskrit lawyer for holding that the texts relied upon for the opposite proposition do not sustain the argument addressed on behalf of the plaintiff-appellant to the effect, that they involve negation of any one of the three legal capacities which I have before now described as forming the essence of the right and power of adoption, even when an only son has been adopted. In this interpretation of those texts Mr. Mandlik's views are fully supported by what another Hindu Sanskrit scholar and lawyer, Mr. Golap Chandra Sarkar, says at page 284 *et seq.* of his work on adoption. I wish to add in connection with the exact interpretation of the Sanskrit texts that I have had the honour and advantage of consulting my respected friend, an eminent Sanskritist, Mr. Archibald E. Gough, Principal of the Muir Central College,

1892
BENI PRASAD
v.
HARDAY
B. B.

Allahabad, and that his interpretation of those texts is consistent with the meaning placed upon those texts by the two Hindu Sanskritists and lawyers above-mentioned.

Consistently therefore with the views which I expressed in *Ganga Sahai v. Lekhraj Singh*, (1) I hold that such restrictions as are indicated in the texts upon the adoption of an only son are merely religious and moral as distinguished from *legal*; that they amount to moral or religious admonitions relating to the choice or selection of an only son for purposes of adoption as a matter resting between the giver and the taker; that as such admonitions they do not in law vitiate any one of the three capacities which I have held are essential to the legal validity of Hindu adoption. And it follows, therefore, that the doctrine of *factum valet* applies to this case.

This answers the reference to the Full Bench; and I should have stopped here, but for the fact that stress was laid in the course of the discussion that I am precluded from any such view by the reasoning upon which my judgment in the Full Bench case of *Tulshi Ram v. Behari Lal* (2) proceeds. In that case my views had the approval of the learned Chief Justice and my brother Judges, and I need scarcely say now that I am satisfied with the distinction which the learned Chief Justice has drawn in his judgment in this case between the interpretation of the texts in that case and those which have to be considered here. I may, however, say perhaps that in the case of *Ganga Sahai v. Lekhraj Singh*, (1) to which I revert for easy reference, I stated (at page 290) that the *Mimansa* formed a source of Hindu Law and governed the interpretation of its texts; and that in the case now before us, the learned Chief Justice has shown how the rules of interpretation adopted by *Jaimini* justify a distinction between an adoption by a Hindu widow without her husband's authority and the adoption of an only son given by his natural father to a widow who has been duly authorized by her husband to take a son in adoption. I may also add that irrespective of *Jaimini's* rule of interpretation, there are

(1) I. L. R., 9 All., 253.

(2) I. L. R., 12 All., 323.

many important reasons, as stated by me in *Tulshi Ram v. Behari Lal* (1), which, according to my notions of the Hindu Law, distinguish the power of an unauthorized Hindu widow to adopt a son from the question which has arisen in this case.

1892
BENI PRASAD
v.
HARDAI
BIBI.

In connection with the suggested conflict between my ruling in *Tulshi Ram v. Behari Lal* (1) and the views which I have taken in this case, I am anxious, in order to prevent possible confusion in the future, to point out that at page 337 of the report I distinctly reserved the question which arises in this case, and that referring to the same matter at page 339, I distinctly indicated the scope of the question with which I had then to deal to the exclusion of the adoption of an only son with reference to the Full Bench ruling of this Court in *Hanuman Ticari v. Chirai* (2).

I do not wish to end this judgment without explaining two further matters for preventing any possible misapprehension of the *ratio decidendi* adopted by me in the two earlier adoption cases to which I have repeatedly referred. Now, in the first of these cases, *Ganga Sahai v. Lekhraj Singh* (3), I explained that the beatitude of the adoptive parent is the *main* (I did not say the *sole*) object of adoption, and so far as the spiritual beatitude is concerned I need only refer to what has been said by Mr. Mandlik (at pp. 456 and 467) to show that the begetting of a son is a moral obligation, and failing that, adoption is desirable, and that failing either the childless Hindu may attain salvation by other methods. In this connection I may also invite attention to the remarks made by the same learned author at page 500 of his work; so that in the case of the father of an only son giving that son away in adoption his spiritual welfare may be secured by him by other methods. And this answers any difficulty which may arise over the views expressed by me in the case cited as to the spiritual beatitude being the *main* reason for the Hindu Law of Adoption.

(1) I. L. R., 12 All., 328.

(2) I. L. R., 2 All., 164.

(3) I. L. R., 9 All., 253.

1892

BENI PRASAD
v.
HARDAI
BIBI.

Now, the next matter which I wish to explain is common both to my judgment in *Ganga Sahai v. Lekhraj Singh* (1) and that in *Tulshi Ram v. Behari Lal* (2). The contention is that so far as the authority of the *Dattaka Mimansa* of Nanda Pandit is concerned those two judgment are conflicting; that, in the present case, not only the authority of the *Dattaka Mimansa* but also that of the *Dattaka Chandrika* are binding authorities upon this Court, and that since they agree in declaring the adoption of an only son to be void, they should be followed by us as they were by the recent Full Bench ruling in *Waman Raghupati Bova v. Krishnaji Kashiraj Bova* (3).

In regard to this part of the argument I wish to invite attention to what I said in *Ganja Sahai v. Lekhraj Singh* (1) as to the various grades of authority to which the Hindu Law text-books are entitled, according to the class to which they belong in Hindu jurisprudence. The *Dattaka Mimansa*, as also the *Dattaka Chandrika*, belongs to the last of the classes, namely, *Nivandhana* or digests, prepared by later writers according to their interpretation of higher authorities. As to the former of these two I have said enough in the above case (at pp. 322—324) and again in *Tulshi Ram v. Behari Lal* (2), and I need only say that so far as the authoritativeness is concerned I hold the same views also in regard to the latter of these works. The result is that, in my opinion, both these works, since they do not belong to the higher grades of Hindu Law books, are open to be questioned by citation of other authorities, as has been done in this case. The summary of the *Dattaka Nirnaya* given by Dr. Jolly at page 309 of his work (Tagore Law Lectures for 1883) and again the discussion of the same subject by Mr. Mandlik at page 501 of his work sufficiently justified that in a case like this the authority of the *Dattaka Mimansa* or the *Dattaka Chandrika* is not so supreme and binding as to preclude the conclusion at which the learned Chief Justice has arrived in this case and in which I have expressed my concurrence.

(1) I. L. R., 9 All., 253.

(2) I. L. R., 12 All., 328.

(3) I. L. R., 14 Bom., 249.

In conclusion, I wish to say that no sufficient reason is shown for us to depart from the last Full Bench ruling of this Court upon this point in *Hanuman Tiwary v. Chirai* (1), and that my answer to the reference in this case is the same as that given by the learned Chief Justice, rendering it unnecessary to deal with the two remaining questions referred to the Full Bench.

1892
BENI PRASAD
v.
HARDAY
ET AL.

KNOX, J.—The first and, indeed, the main question referred to us is, whether or not the adoption of an only son having taken place in fact, such an adoption is null and void under the Hindu Law?

This same question was in 1879 referred to a Full Bench of this Court for decision with the result that all the Judges who composed that Full Bench, with the exception of Mr. Justice Turner, were unanimous in the answer given, that “the adoption of an only son is not altogether void, but that having once been made the adoption is valid.”

The question therefore is not *res integra*. It has already been answered by this Court in the affirmative, and as the answer was given by a Full Bench of the Court, it would, according to long and established practice, be regarded as conclusive, unless a decision of the Privy Council militating against it could be pointed out, or as Sir Charles Sargent adds, unless perhaps “the Court could be clearly shown to have formed its conclusion upon a mistaken impression as the text of the Hindu Law books upon which it relied”: Sir C. Sargent in *Waman Raghupati Bora v. Krishnaji Kashirav Bora*. (2)

We have been referred to no such ruling of the Privy Council. On the contrary both parties are agreed that the question is one upon which their Lordships have not up to the present date delivered themselves of any decision. It only remains to be seen whether the decision is in accord with the principles of Hindu Law.

The reason given why the Court should reconsider the opinion at which it arrived in 1879, is that the answer of the Full Bench in that case is felt by some to be an answer open to serious doubts.

(1) I. L. R., 2 All., 164.

(2) I. L. R., 14 Bom., 249.

1892
BENI PRASAD
v.
HARDAY
L. B. I.

To learned Judges who joined in making the reference allude to two cases in which this doubt led Division Benches of this Court in 1886 to refer the same question a second time for consideration by a Full Bench. They refer also to a number of cases for and against the validity of the adoption of an only son, and those cases do beyond all doubt establish that the question is a question upon which there does exist, and has always existed among the Courts in India, much conflict of authority.

To my mind, however, the fact that twelve years have passed since this Court pronounced upon the validity of such an adoption, and the further fact that its dictum cannot fail, so far as these provinces are concerned, to have had considerable weight upon the minds of all prudent persons, who may have sought to perpetuate their name and lineage by an adoption of this nature, are facts which cannot be left out of consideration and which would in any case make me hesitate to give utterance to an opinion in the opposite direction. I feel that before I could do so I should need irrefragable proof that the prior ruling rested upon either a wrong foundation or upon no foundation at all. I consider it a happy result that careful examination of the text-books confirms and places so far as I am concerned, beyond the region of reasonable doubt the wisdom, truth and soundness of the conclusion at which this Court arrived in 1879. For, as I have already pointed out, it is not difficult to conceive that there may be some or even perhaps many families who would be thrown into serious trouble and unrest if we found it necessary now to hold otherwise on this point.

I have considered the question with the gravest anxiety. Had it not been for the approaching departure of my brother Straight, I should have deemed it necessary to ask the Court to postpone the delivery of this judgment until I had found it possible to place on record all the information I have obtained and the various reasons why I feel satisfied that the only true answer that can be returned to the question is that the adoption of an only son, once it has taken place, been completed and recognized, must, so far as the provinces over which this Court has jurisdiction are concerned, be

considered a valid act. Such an act may be the height of imprudence on the part of the giver; it may even, by those who pride themselves upon their strict observance of Hindu scripture, be considered a blameable act. But upon the authority of the same scripture it is as I shall presently show an act which is not a "Mahapatak": it ranks and is classed with acts which are "Upapatak," which can be atoned for by penances of a comparatively easy description, and when atonement has been made, the author of the act is as capable of going to heaven and is as pure as those who have performed meritorious deeds.

1892
BENI PRASAD
v.
HARDAI
BIBI.

But before going to the text-books themselves I propose examining very briefly the cases in which an opinion contrary to that held by this Court is to be found. Such an examination will best show the difficulties which have been felt in the minds of Indian Judges, some of them Judges of exceptionally high authority, and which have led those Judges to the conclusion that Courts in India are compelled to treat an adoption of this nature as an act which cannot possibly be performed and which must therefore be considered utterly null and void.

The cases to which we were referred in the argument as cases in which the adoption of an only son had been finally and in definite terms held to be invalid, were four in number:—

Nundram v. Kashey Pandey (1).

Manick Chunder Dutt v. Bhuggobutty Dossee (2).

Upendra Lal Roy v. Srimati Rani Prasanna Mayi (3).

Waman Raghupati Bova v. Krishnaji Kashirav Bova (4).

In the first of these cases the ground upon which such an adoption was declared invalid was the opinion given by the Pandits who were consulted that according to the law current in Tirhoot the adoption of an only son was invalid.

(1) 4 Sel. Rep., 70.

(2) I. L. R., 3 Calc., 443.

(3) 1 B. L. R., A. C. 221.

(4) I. L. R., 14 Bom., 249.

1892

BENI PRASAD

v.
HARDAY
BIBI.

I have been unable to consult the reports in which this case is contained, and the only reference to it, as given in I. L. R., 3 Cal., p. 450, contains none of the reasons which led the Pandits consulted to form that opinion or of the reasoning by which the Judges felt constrained to accept that opinion without reserve. The case therefore cannot be pressed further than this, that it is an authority in favour of the view that the law as understood by Pandits concerning such adoptions in Tirhoot and as current in the years 1823 and 1824 was to the effect that an adoption of this kind is invalid.

In the second case Mr. Justice Markby, and with him the learned Chief Justice, Sir Richard Garth, held that the entire authority in Bengal was against the validity of the adoption of an only son, and that for all classes of Hindus in Bengal such an adoption must be held invalid wherever the effect of the adoption, if valid, would be to extinguish the lineage of the natural father and to deprive the ancestors of the natural son of the means of salvation.

The third case is the one in which Mr. Justice Mitter pronounced that the adoption of an only son was forbidden by the Hindu Law; that the subject of adoption was inseparable from the Hindu religion itself, and that all distinction between religion and legal injunction must be necessarily inapplicable to it. He also enunciated his opinion that one of the essential requisites of a valid adoption is that the gift should be made by a competent person, and that the Hindu Law said distinctly that the father of an only son had no such absolute dominion over that son as to make him the subject of a gift. From this he naturally went on to say that the doctrine of *factum valet* would not help towards rendering such an adoption when made a valid act.

There remains the case in which the learned Chief Justice of Bombay, Sir Charles, Sargent and with him the rest of the Judges in Full Bench assembled, concurred that a previous Full Bench had decided after solemn argument that the adoption of an only

son was by general Hindu Law invalid. and that no reason had been assigned which could justify interference in that decision.

1892

BENI PRASAD

v

HARDAI
BIBI.

The judgment which has just been delivered by Sir John Edge, and which I had the privilege of reading before it was delivered, contains such a careful and exhaustive examination of these cases and of the influences under which those precedents were apparently prepared that it is quite unnecessary for me to take up the time of the Court with observations of a like character. The reasoning of the learned Chief Justice appears to me exhaustive and convincing upon this part of the case. I shall confine my judgment to an examination of the original texts, and show that the reasons given in each of the judgments above quoted are reasons which appear to me based either upon a wrong estimate of the value of the authorities themselves, or of the value which those authorities intended to attach to such an adoption, or upon an imperfect knowledge of the text of the authorities. Under this last head would I also place errors which have flowed from a consideration of a single text detached and apart from its context.

I wish to add that I do so with extreme diffidence, and with the profoundest respect for those from whom I am compelled to differ. For it cannot be denied that the late Mr. Justice Dwarka Nath Mitter was versed in the Sanskrit language and that he, Mr. Justice Markby, Sir Michael Westropp and others who acquiesced in these reasons were lawyers who had devoted considerable time and attention to the subject of Hindu Law.

In order to arrive at a right conclusion as to what is or is not forbidden by Hindu Law, it is necessary to define accurately the position occupied by the writer of the texts that will presently come under examination. These writers may be placed, so far as sequence of time is concerned, in three groups. In the first would come Manu, Vasishtha and Yajnavalkya, in the second Narada and Vijñaneswara, and in the third by himself Nanda Pandita, the author of the Dattaka Mimamsa. I do not propose to enter into any abstruse questions of chronology ; it is sufficient for my purpose to show that there is a broad line of demarcation in point of time and also of binding authority between these several groups of

1892
BENI PRASAD
v.
HARDAI
BIBI.

authorities. Nor would I deem it necessary to deal with the question at all, were it not for attempts made in the course of argument to treat all the authorities cited as entitled to equal weight and respect. True criticism teaches very differently. It is conceded that what is now received and known as the "Institutes of Manu" may be taken to be anterior in point of time, or at any rate to represent more accurately than any other work the oldest exposition extant of Hindu Law. It is asserted by some that the author or authors were men who possessed and did wield the authority of kings. So far as those Institutes are concerned, I shall show that from either point of view, viz., that whether the authors were law-makers and law-givers, or whether they were merely law-teachers, the result, so far as the present question is concerned, is the same. Every orthodox Hindu would unhesitatingly allow that Manu, Vasishtha, and Yajnavalkya received what they afterwards promulgated direct from divine sources. He would maintain or acquiesce in the view that every word uttered by these Sages stands above criticism and should be deemed binding upon the conscience if not upon the conduct of everyday life. The second group he would put on a different footing; he would probably allow that the text of Narada was of very great weight and that Vijnaneswara was a commentator entitled to much respect, but still only a commentator. In the case of both and especially of the latter, criticism would not be resented, particularly when there appeared to be conflict between them and the sayings of the first group of writers. And when the third group is reached, he would be prepared to allow that the work of Nanda Pandita is as much open to review as the text of any commentator of the present school.

As, however, the present question cannot be dismissed as the more orthodox Hindu would dismiss it, with the mere dictum that the answer to it does or does not rest upon Divine revelation, I am compelled to add a few further remarks upon the position occupied by Vasishtha, Manu, and Yajnavalkya.

The fact that what we possess of the sayings attributed to the writers in the first group has come down by tradition, shows that

those sayings were possessed of vitality strong enough to defy the power of time. Even if they do contain words that have been misunderstood or misquoted, even if they contain additions or interpolations, the words misunderstood, the additions and interpolations are of venerable antiquity, and have so far been accepted by the generations through which they have passed before they reached the hands of the commentators that no distinct command contained in them can now be said not to amount a command. They are sayings which do constitute law, and where they have to be explained away or added to, the only safe ground upon which such explanation or addition can be accepted is that the explanation or addition springs out of or rests upon कुलधर्म or स्वधर्म, which terms may, if freely translated, be said to represent "custom" in the proper and legal sense of the word. I shall presently show that Manu himself does not object to such custom being accepted as law, provided it be ascertained and settled after enquiry made by a sovereign power who knows the Sacred law.

1892
BEN PRASAD
v.
HARDAI
BIBI.

The authority of Narada, however, and of the commentators after him rests upon a very different footing. The highest position which Professor Jolly, who has made Narada's work the subject of special study, would allot to his Smriti is that it is an independent and therefore specially valuable exposition of the whole system of Civil and Criminal Law as taught in the law schools of the sixth century of the Christian era. This is, I venture to think, a right estimate. As for the rest their authority is in my opinion almost, if not quite, as much open to examination, explanation, criticism, adoption or rejection as the work of any scientific treatise on European or American jurisprudence : where they deviate from or add to the Smritis, great caution is required in adoption their gloss, and still greater caution if it is made to appear that कुलधर्म or स्वधर्म is in apparent harmony with the Smriti and at discord with the gloss.

Their Lordships of the Privy Council have⁽¹⁾ recognized that the authority of Manu is one which may properly be referred to when

(1) *Ramalakshmi Ammal v. Sivanantha Perumal Sethurayer.*

(14 Moo. I.A., 570).

1892
BENI PRASAD

v.
HABDAD
BIBI.

it is necessary to resort to first principles in order to ascertain and declare the Law. I propose to refer to it for two purposes :—

1st.—To point out what the Institutes of Manu teach as Law to be enforced by a king upon his subjects. So far as I am concerned, it seems to me treading on dangerous ground to lay down as positive Hindu Law which is to be enforced by our Courts any precept which is foreign to the teaching contained in the Institutes of Manu.

2nd.—To bring together all the texts which are contained in the Institutes of Manu on the subject of adoption.

As regards the first point it will be remembered that Manu opens with a demand on the part of the great Rishis to be taught precisely and in due order the sacred laws appertaining to the different castes. In complying with their request after certain preliminary remarks upon the creation of the Universe, Manu is described as laying down that in his work the sacred law has been fully stated as well as the good and bad qualities of actions and the immemorial rule of conduct by all the four castes. The rule of conduct is transcendent Law, whether it be taught in the revealed texts or in the sacred tradition, hence a twice-born man who possesses regard for himself should be always carefully as to it (1). He further teaches in the second chapter and 6th verse that the whole Veda is the source of the sacred Law, next the Smriti (or tradition) and the virtuous conduct of those who are learned, also Achara (or the customs) of holy men, and self-satisfaction.

The seventh chapter is entirely devoted to the duties of kings, and very significant verses in that chapter as to the view which Manu, and with him every true Hindu, would take of Law, are the 14th and 18th verses, which run as follows :—“ For the (King’s) sake the Lord formerly created His own Son, Punishment, the “protector of all creatures and the (*i.e.*, an incarnation of the) Law, “formed of Brahmans’ glory.”

“Punishment alone governs all created beings, punishment alone “protects them, punishment watches over them while they sleep, “the wise declare punishment *the* law.”

(1) Chapter I, vv. 107 and 108.

Chapter VIII is devoted to an exposition of the civil, the criminal and the ceremonial law which a king according to Manu is bound to administer. In the 41st verse of that chapter we read that a king "who knows the sacred law should enquire into the laws of "caste, of districts, of guilds, and of families, and settle the "peculiar law of each."

1892

BENI PRASAD

v.
HARDAI
BIBI.

It is worth nothing that the word translated "settle" प्रतिपादयेत् in this verse according to a commentary (the Manvarthachandrika, written by Raghavananda Sarasvati) should be read प्रतिपादयेत् which would make the last clause run, "Protect the peculiar law of "each." Observations on the subject of interest, debt, pledge contract (fraud and force as vitiating contract), bailment, sale and gift without ownership, title by purchase, wages, master and servant, boundary disputes and other kindred matters are spread over some 120 slokas. As many more slokas are taken up with assault, theft, and other crimes. I have examined the whole of this chapter with the utmost care, and there is not one word in it which attaches any disability or punishment to, still less contains any prohibition against, the kind of adoption now under consideration. The ninth chapter is first devoted to the propounding of the duties of husband and wife. The next subject treated in it is the subject of inheritance, and of this chapter I shall have more to say when I bring together the verses relating to adoption. I pass it over for the present with the remark that anyone who seeks to find in it any disability or punishment attached to or direct prohibition against the adoption of an only son will weary himself in vain.

In the eleventh chapter the subject treated of is penance. Offences are classified therein as Mahapatakas (mortal sins) and Upapatakas (minor offences), and of both verse 108 says that by means of the penances laid down in the verses preceding verse 108, "men "who have committed mortal sins may remove the guilt, but those "who have committed minor offences causing loss of caste" can remove their guilt by the penances set out in the verses following v. 108. This chapter has also been considered by me with minute care and attention. The range of acts which are classified under mortal

1892
BENI PRASAD
v.
HARDAI
BIBI.

offences and minor offences is a very long and varied one. The only text which can by any possibility bear upon the performance of a sinful or invalid adoption is verse 66, and this runs as follows:—
“Neglecting to kindle the sacred fires, theft, non-payment of (the “three) debts, studying bad books, and practising dancing and “singing” are all (see verse 67) classified as minor offences causing loss of caste. The text of verse 66 contains only the words ऋणादायपद्धिदा, which literally translated is non-payment of debts. I think, however, that it is by no means forcing the words to place upon them the interpretation that they refer to the non-payment of the “three debts,” a term familiar to every Hindu. One of the three debts is the procreation of a son. If the verse does not apply to those three debts there is again no offence in this list which can be held to include the offence of bringing about an unlawful or sinful adoption. If the verse does allude to such an adoption, then the act is an Upapatak or minor offence. Verses 72 and 108 *et seq.* teach how such an offence can be expiated. This penance may be briefly described as living in a cowhouse for a month, fasting for two months more, worshipping and serving cows, and culminates in the giving of ten cows and a bull to Brahmins. If his conscience is particularly sensitive the offender may add strict fasting relieved only by a meal once a day on boiled barley gruel. I mention this detail in order to give some appreciation of the estimate in which the offence, if it can be called one, is held, and the comparative ease with which it may be expiated. Verse 240 teaches that if these austerities are performed the offender is freed from all guilt. I must not dismiss this chapter without the further observation that the disability of exclusion from inheritance has not been overlooked. It is a disability prescribed as attaching to one who associates with an outcast (v. 185).^{*} The following verses, however, show that upon performing the necessary penances even such an one can recover his position, purge himself of his offence, and free himself from the disability of loss of inheritance.

^{*} This disability is also mentioned in the Chapter on Inheritance; but as no mention is made in that chapter of the adoption of an only son it is not mentioned as a disability attaching to such an act.

From this *résumé*, and I think it is one which will bear close examination, the following conclusions appear to be established :—

1892

BENI PRASAD

1st.—That according to Hindu Law as propounded by Manu, an act prohibited is an act for which punishment is prescribed by the same law.

"
HARDAY
BIBL.

2nd.—That nowhere is a king enjoined to regard a wrongful adoption as an act which is to be followed by दण्ड or punishment.

3rd.—That such an act is not alluded to in the treatise on civil law, still less is any disability prescribed for it.

outside such an act is an *upapatak*, causing it is true temporary loss of caste, but easily expiated and after expiation as much forgotten as if it never had been committed at all.

5th.—That the possibility of exclusion from inheritance as a disability is not a consequence which has escaped the attention of Manu, but that it has been nowhere laid down as a consequence for the adoption of an only son.

To bring together the several texts to be found in Manu on the subject of adoption. They will be found to be very few indeed, and occur in the ninth chapter only. Verses 141 and 142 run as follows : " If the man who has an adopted son possessing all good " qualities (गुण) that same shall take the inheritance though brought " from another family; and adopted son shall never take the family " and estate of his natural father, the funeral cake follows the family " and the estate, the funeral offerings of him who gives cease."

Verse 159 mentions the son adopted as one of the six heirs and kinsmen : verse 168 is the most important of all and defines the qualification necessary for a good adoption. It runs as follows :—

माता पिता वा दद्यातां यमङ्गिः पुत्रमापदि ।

दृग्मयीतिसंयुक्तं स ज्ञेयो दत्तमिः सुतः ॥

" Whom the mother or the father give, with ' water,' a son, " in distress, similar, endowed with affection, he is to be deemed a " *Datrima*, one brought forth." In this translation I have attempted to follow the text word by word, and without interpolating or

1893
BENI PRASAD
v
HABDAI
Bibi.

taking away any particle. This will account in some measure for the roughness of the translation, but in an important passage like this it is a matter of necessity to weight each word and to give its proper weight and significance.

I have been referred to no other text, nor have I either on previous occasions, when I made the laws of Manu the subject of special study, or on the present occasion, when I have attempted to refresh so far as time would allow, my memories of past study, discovered any text which lays down any other qualification or disqualification connected with an adopted son.

Now a close examination of these texts appears to establish the following conclusions :—

1st.—That Manu did devote consideration to the qualifications which go to the essence, if I may call it, of an adopted son, or, to use an expression which has found favor with some learned Judges, the capacities which must unite in a person whom another wishes to give or take in adoption.

2nd.—That as the result of such consideration he solemnly formulated the following as necessary qualifications :—

- (a) Gift by mother or father.
- (b) Gift evidenced by an outward symbol, viz., the ceremony of water or “waters.”
- (c) Gift of a son.
- (d) Gift in distress.
- (e) The son given must be similar.
- (f) The son given must be endowed with an affectionate disposition.

One further qualification may perhaps be inferred, from verse 141, viz., that he must be a son possessed of all good qualities, but the words used in that verse probably are words pointing to verse 168, and “all the good qualities” to which these particular words refer are only the several qualifications which are included within the four corners of verse 168.

Now after this explanation of the only verses which mention adoption, and I have laboured to keep with the utmost closeness to the text, it must strike even a casual observer as curious and extraordinary that Manu should insist upon, as necessary qualifications, that the son must be similar, in whatever that similarity may consist, that he must be endowed with affection, and that he should overlook the qualification that he must not be an only son. To my mind, the one only legitimate conclusion that can be arrived at by any thoughtful and well-balanced mind, is that at the time when the Institutes were handed down and first received, similarity in point of caste was a most necessary qualification, to be endowed with an affectionate disposition was a qualification second only to the former; but that no thought was then received as current which pointed to the necessity of an adopted son being chosen out of a family which contained more than one son. The difficulty of importing the qualification that the son adopted must not be an only son into this text of Manu, was a very serious difficulty to the commentators who wished to advocate it. They were compelled to fall back upon verses in the ninth chapter and to weld them in with this verse. The verse upon which they rely is verse 138 in Chapter IX. That and the preceding verses are as follows:—

V. 137. By a son a man obtains victory over all people; by a son's son he attains immortality (*not the immortal abodes*). Then by the son of that son he reaches the region of Brahma.

V. 138. Since the son delivers the father from the region called "Put" he was therefore called "Putra" by Brahma himself.

I shall allude to verse 138 again: if verse 137 stood alone the primary idea of a son exactly corresponds to that of the Psalmist. The man that hath sons shall "speak with his enemy in the gates."

From these texts the commentators claim the inference that Manu did know of the essential qualification that a son adopted must not be an only son. All I would say is that, if he did, it is and ever will be to me a mystery why he should have left it as

1892
BENI PRASAD
v.
HARDAY
BIBI.

1892 an inference and not mention it in the terms either of a positive
BENI PRASAD direction or prohibition.

"
KARDAI
BIBL.

It is enough to pass from the consideration of Manu with this result that "the want of authority to give or to accept and the "imperative interdiction of adoption" which prevented Sir Michael Westropp from applying the maxim *factum valet* to the adoption of an only son is not to be found in the text of Manu, still less is there any text to the effect that the father of an only son cannot give, that his gift cannot be accepted, and that the son cannot be given.

The Dharma Sashtra of Vasishtha, or as much of it as has been preserved, upon the two points with regard to which I have already examined the Dharma Sashtra of Manu is much to the same effect. On the first point, viz., what is to be considered the law of the land, its teaching is as follows :—

The sacred law has been settled by the revealed text and by the tradition; on failure of these the practice of the Shistās (or men whose heart is free from desire) have authority. Manu has declared that the law of countries, castes and families (may be followed) in the absence of rules of the revealed texts (v. 17, Chapter I).

The doctrine of Mahapatakas and Uppatakas or minor offences causing the loss of caste (Chapter I, vv. 19—23); and also punishment as one of the chief duties of kings, is recognized. (Chapter XIX, v. 40).

Penance (Chapter XX) is recognized and also its efficacy for removing the taint of guilt.

The one passage of great importance, however, is contained in the opening verses of Chapter XV, and it runs as follows :—

शुक्रशोणितसम्भवः पुरुषो मातापितृनिमित्तकस्तस्य प्रदानविक्रयपरित्यागेषु
मातापितरौ प्रभवतः न त्वेकं पुत्रं दद्यात् प्रतिगृह्णीयात् वा स हि संतानाय
पूर्वेषाम् ।

"Man formed of uterine blood and virile seed, proceeds from his mother and his father as (an effect from its cause). The father

"and mother have power to give, sell and abandon him, but ^{he}_{she} 1892
 "should not give or should not take an only son, for he is for the BENI PRASAD
 "prolongation of the line of ancestors."

v.
 HARDAI
 BIBL.

It is contended and has been contended before us with great persistence by Mr. Banerjee that we must accept this saying of Vasishtha's as a direct prohibition having the force of law.

The first difficulty connected with its acceptance as a direct prohibition is that the words which represent "he should give" and "he should take" are verbs couched in the optative mood.

Now the Sanskrit language permits of a verb being conjugated in three amongst other moods, viz., the imperative, the subjunctive, and the optative. The imperative signifies as in other tongues, a command or injunction, an attempt at the exercise of the speaker's will on some one or something outside of himself. The subjunctive may be omitted as it became very early extinct or all but extinct. The primary office of the optative is the expression of wish or desire. In the oldest language its prevailing use in independent clauses is that to which the name optative properly belongs, "but the expression of desire on the one hand passes naturally over into that of request or entreaty, so that the optative becomes a softened imperative; and on the other hand it comes to signify what is generally desirable or proper, what should or ought to be and so becomes the word of prescription; or yet again it is weakened into signifying what may or can be, what is likely or usual, and so becomes at last a softened statement of what is." Whitney, paras. 572—575.

It may, however, be said and with truth that nearly every text contained in Vasishtha runs in the optative mood, and that in the classical language no sharp line of division exists between the imperative, subjunctive, and optative.

Both such statements if made would need qualification. Vasishtha can, as far instance in Chapter XI, verse 45, give a very imperative direction, and does so by using after the optative *dadyat* (the very mood and verb used for "he should give" in Chapter X, v. 3—the verse which deals with the giving and taking of an only son)—the

1892
BENI PRASAD
v.
HARDAY
BIBI.

adverb अवश्यम्. He does not add this adverb in Chapter X, v. 3, and the inference we are entitled to draw is either that he felt the precept of giving an only son could not be enforced as a law and must be left as a desire, or that he never meant it to reach a higher platform than that of entreaty or desire.

The second qualification is that, while it may be said that there exists no sharp line of division between the imperative and optative moods it cannot be denied that there does exist a difference of degree. One would not expect to find a softened form of imperative used when the object was to stigmatise an act as impossible or as an act forbidden by a strong interdictory mandate.

However, the reason why I am not prepared to attach to this verse the force of a direct prohibition rests not on the grammar only, but upon the treatment of the subject of adoption by Vasishtha himself, the second of the subjects proposed by me for examination. In the sixth verse of the fifteenth chapter the man who desires to adopt a son is advised to take a not remote kinsman, just the nearest among his relatives. If after so taking him the adopter entertains doubt, and this doubt, the commentators explain as a doubt regarding the caste or other qualifications of his adopted son, the adopter is advised to set him apart as a Sudra. Now if it be conceded for the sake of argument that one of the qualifications is a doubt whether or not he is an only son, then according to Vasishtha the expedient course to adopt is to set apart the unfortunate boy as a Sudra. It is not said that he becomes a Sudra or ceases to belong to the family or that his adoption becomes *ipso facto* null and void. And lest any one should say that he can never be re-admitted into caste, Vasishtha in the 17th verse of the same chapter adds, that the performance of penance will enable any outcaste to re-admission even to sacred rites. But as I said before, whether this was the qualification alluded to by the writer is, and must probably remain, conjecture.

It may be said with safety that the adoption of an only son is an inexpedient act. Any assertion that Vasishtha meant more is matter of doubt.

Once more Vasishtha deals with the question of inheritance and exclusion from inheritance. Thus Chapter XVII, vv. 52, 53. "Those who have entered a different caste, eunuchs, madmen and "outcastes, receive no share." No allusion is made to only sons who have been taken in adoption, and the absence of any mention of them cannot be said to have been the result of forgetfulness or accident.

1892
BENI PRASAD
v.
HARDAI
BIBI.

There remains however a still further reason, and one which will probably be appreciated still more strongly by Hindus, and after all the only way of attaining a proper knowledge of Hindu Law is by placing once's self, as far as a foreigner possibly can, on the standpoint from which a Hindu would look at the question. To import foreign ideas and bring them to bear upon interpreting Sanskrit texts when modes of interpretation sanctioned by Hindu logicians of the highest authority are forthcoming is an obvious error. In the present case we have the advantage of such a guide in the Purwa Mimansa of Jaimini, Chapter I, section 2, verses 26-30. That learned philosopher about whose authority there is no room for doubt lays down as a rule of interpretation both for civil and religious ordinances that where a text is followed by a clause assigning a reason, a doubt at once arises whether such texts are simply commendatory or obligatory. Now the word Jaimini uses in this passage for obligatory is expressed by a gerundial participle. The force given by such participles as this passage shows and as Whitney points out is a force expressing "something which is to or which ought to suffer the "action expressed by the root from which they come" (section 961).

This rule of interpretation coincides with the natural construction from a grammatical point of view. According to both this text expresses nothing more than an act of expediency.

Not text of Vasishtha was pressed upon our notice beyond the first four texts and Chapter XV. So far as I have been able to examine the original and the translation as contained in the Sacred Books of the East Volume, XIV, there is no other text which bears directly upon the subject.

1892

BENI PRASAD

v.

HARDAY
BIBI.

The law, therefore, as far as it can be gathered from Vasishtha, probably amounts only to an expression that the adoption of an only son is an inexpedient act and cannot—if a regard to rules of construction approved by Sanskrit writers themselves be had—be with safety said to amount to a direct prohibition. There is no text declaring such an act impossible or null and void. At the very outside, and even this I find it difficult to concede, it may be an act *quod fieri non debuit*.

The act is entirely omitted from the list of acts which amount to Mahapatakas, and can only by a strained interpretation be included in the list of Upapatakas.

I have gone with great care and attention through a text of Vasishtha published in the year 1805, and I have also compared the translation compiled by Dr. Buhler in 1882 after he had the good fortune to consult and examine the only three complete manuscripts of this writer which had up to that time been found. There is, as I have already said, from first to last, no allusion to the region termed "Put." The idea of a son and the benefit to be derived from him are given in Chapter XI, vv. 41 and 42, which are as follows:—

The ancestors always rejoice at a descendant who lengthens the line who is zealous in performing funeral sacrifices and who is rich in Gods and Brahmans. The Manes consider him their descendant who offers food at Gaya, and they grant him (blessings) just as husbandmen (produce grain) on well ploughed fields.

So remarkably free is Vasishtha from the idea of a son as being requisite and necessary for salvation, that I felt no little surprise when I came across the passage quoted by Mr. Mandlik at page 499 of his work. I at once turned to the reference in original as given by him in his footnote, and found that the words in that passage contained no allusion whatever to salvation. Fortunately Mr. Mandlik has given the next in original just above his translation, and there the words are न त्वेकं पुत्रे दद्यात् प्रतिगृह्णीयात् वा स हि सन्तानाय पूर्वेषाम् ॥

The translation of these words are, as already pointed out, "but he should not give or take an only son, for he is for the prolongation of the ancestors." 1892

BENI PRASAD

v.
HARDAY
BIBI.

A reference to the footnote shows that, when Mr. Mandlik translated, he translated not from the text of Vasishtha or even from the text he had just reproduced from the Dattaka Mimansa. He translated from a reading in the Mayukha, which substitutes, on what authority I am unable to discover, स हि त्रायते पुरुषम् instead of स हि सन्तानाय पूर्वेषाम्.

Dr. Bühler does not even allude to such a text, and there is not doubt in my mind from its repugnance to the rest of Vasishtha that the text of the Mayukha if correctly given is an emendation or improvement on the original and not the original text itself.

I now pass on to the Dharmasastra of Yajnavalkya. In considering these I have again been confronted with the difficulty of want of leisure to study these Institutes and the commentary on them by Vijnyaneswara in the original and as a whole. I have contented myself with a careful study of the passage to which Mr. Bannerji referred us (and this was from the Commentary), and to the translation of that Commentary by Colebrooke. The passage to which he referred us is to be found in Chapter I, section XI, vv. 9 *et seq.** Now this passage needs careful examination.

Verses 9 to 11 run thus—

“मात्रा भर्तुरनुक्षया प्रोषिते प्रेते वा भर्तरि तत्पित्रावोमाभ्यां वा सवर्णाय यस्मै दीयते स तस्य दत्तकः पुत्रः ॥ यथाह भनुः ॥ माता पिता वा दद्यातां यमद्भिः पञ्चमापदि ; सदृशं प्रीतिसंयुक्तं स ज्येष्ठो दत्त्रिमः सुतः, इति ॥ आपद्यद्गृह्णादनापदि न देयो दातुरयं प्रतिषेधः । तथा एकः पुत्रो न देयः ॥ न त्वेवैकं पुत्रं दद्यात्प्रतिगृह्णीयादिति वसिष्ठस्मरणत् । तथानेकपुत्र-सङ्गावेपि ज्येष्ठो न देयः ॥ ज्येष्ठन जातमात्रेण पुत्री भवति मानव इति ॥ तस्यैव पुत्रकार्यकरणे मुख्यत्वात्.”

1892
BENI PRASAD
v.
HARDAY
BIBI.

"He who is given by his mother with her husband's consent while her husband is absent or after her husband's decease, or who is given by his father or by both, being of the same class with the person to whom he is given, becomes his given son. So Manu declares" and then follows the 168th sloka or verse of the fifth chapter.

The commentator continues, "By distress it is intimated that the son ^{is} _{ought} not to be given unless there be distress. This prohibition regards the giver."

"Similarly an only son ^{is} _{ought not} to be given, for there is the Smriti of Vasishtha to the effect that—"But he should not take or accept an only son."

Mr. Colebrooke has translated this passage, and the translation has been much relied upon by the learned Judges in the rulings referred to at the beginning of this judgment. But the first point to be noticed is that the translation contains an undoubted error. The words used by the commentator are not, from a grammatical point of view, one with more imperative than those of Vasishtha.

Next it will be seen that the commentator bases this dictum, that an only son is not to be given, on the text of Vasishtha, and I have already shown what only that text can with safety be held to mean.

Thirdly; it will be noted that the commentator, while expressing an opinion that there was a prohibition against the giving of a son when there was no distress, and a similar prohibition when there was an only son, passes over in silence any prohibition as regards the taker. Now one leading idea which runs through the Commentary of Vijnyaneswara, on Yajnavalkya is that the essence of a gift consists in its acceptance not in the giving. His doctrine is a gift is not a gift because it is given, but it becomes a gift when it has been accepted. The whole argument leading up to this will be found in Chapter I, section 1, v. 10, *seq.* By his omission of any text about the taker he has surely stopped short of giving any

sanction to the idea that the gift of an only son was an invalid act.

1892

PENI PRASAD

v.

HARDAI

BIBL.

Fourthly; another doctrine on which the commentator insists is that property and proprietary right are temporal matters, and not, as some would hold, the result of holy institutes exclusively.

Fifthly; he gives, as we would expect, prominence to the text of Manu. In continuing the disquisition he comments upon the necessity for due observance of the requisite ceremonies, and he has already given the first place in his text to the essential necessity of distress as a condition precedent to adoption. Examining the Commentary further, it will be found that in the second chapter, section 10, he deals with exclusion from inheritance. He enumerates a number of persons who are excluded from participation in succession. The roll of persons excluded does not differ from that given by Vasishtha and Manu beyond that the terms "impotent," "madman," &c., are explained, and that the commentator advocates their maintenance out of the family property although subjecting them to exclusion from participation, as we have already seen. There is not one word which permits of foundation for the idea that an only son taken under the guise of adoption is to be excluded from inheritance. Such an idea would militate with the doctrines already set out, it would militate also with another doctrine of his, that property, however acquired, does not become invalid because the means by which it is acquired amounted to an infringement of restrictions. In advancing this doctrine he does not overlook an objection that might be offered that proprietary right obtained by robbery and other nefarious means would still be property. This he answers by saying that such a right is not recognized by the world and disagrees with received practice. In other words, he recognises the right of custom as a controlling power of high authority. Other instances of this view in his work will be found in Chapter I, section 1, vv. 22 and 23, 32, &c. Whether then we consider the authorities upon which the commentator relies, viz., Manu and Vasishtha, or whether we consider the text in the light of the principles that pervade his

1892

BENI PRASAD

v

HARDAY
BIBI.

writings, the inference is irresistible that in laying down the text as he did, the commentator meant no more than to enunciate as Yajñavalkya's and his own views that the giving of an only son was an optative act, an act of expediency.

Another point which cannot be passed over in silence is the fact that he too does not import directly and in express terms into the doctrine of adoption any idea of salvation from "Put" in attainment of heaven. Before proceeding to commentators I would again draw a marked attention to the absence of this point from the texts on adoption in all the writers of this group. There is only one passage in Manu and that in the Chapter on the Domestic Life of the Commercial and Servile classes, where the idea is wedged in. To that verse I shall allude hereafter. In fact the only idea we have been confronted with when adoption is being discussed is the solitary one that an only son should not be taken in adoption because the object for which he was destined was the prolongation of the line of ancestors, an idea which probably owes its foundation to vainglory and temporary power rather than to any idea of spiritual benefit in another world. Even in the *Mitakshara* I have been unable to find any such idea, and I have not been referred to any text which would show that Vijñāneswara gave it his sanction. The real and legal position of father and son up to the end of this period of Hindu Law was briefly this:—The father was the patriarch with power of sale and gift over his offspring, a power which could not be questioned by the son: Thus Manu (Chapter VIII, sloka 416) declares, "Three persons, a wife, a son and a slave are declared by law to have no wealth exclusively their own; the wealth which they earn is acquired for the man to whom they belong." And a further principle was this, that a son, especially if a relation when adopted into a family, was at once made and treated as one of the family circle. (Manu, Chapter IX, sloka 169.)

The text of Narada was not referred to by the other side in the course of the argument. I will not therefore refer to it at any great length. But a consideration of his views on the subject, if they can be gathered with accuracy from the text, is important for

this reason, that it is upon a text of his and one of Saunaka that Nanda Pandit really rests his doctrine that the adoption of an only son is invalid.

1892

BENI PRASAD

v.

HARDAI
BIBI.

Narada's work, as I have already said, follows by a long interval of time the work of Yajnavalkya and is supposed to have preceded that of Vijnyaneswara by an interval of some seven centuries. His works contain doctrines decidedly opposed to the teaching of Manu, and it is very improbable that a writer of such clearness, as he is, would have ventured to differ on essential points, unless he had good authority for doing so or aimed at being a reformer. That he was an author whose writings exercised great influence is evident from this one fact alone, to which Dr. Jolly testifies, that upward of half his works has been embodied in the authoritative composition of the mediæval modern writers in the province of Sanskrit Law (S. Bk. East, XXXIII and XXI).

Narada examines at some length the doctrine of valid and invalid transactions, and the conclusion of the whole matter is, according to him, that validity of a transaction hinges upon the independence of the parties to it. This, it will be perceived, is a new doctrine entirely and is the key note to the position he takes up about the gift of a son.

The doctrine of invalid gifts is again taken up and examined by him in the fourth title of law under the head "resumption of gift." Sixteen kinds of invalid gifts are enumerated, and under none of them can by any possibility be placed the gift in adoption of an only son. But there are two verses in the earlier part of the chapter, vv. 4 and 5, which run as follows :—

"An Anvahita deposit, a Yachita, a pledge, joint property, a deposit, a son, a wife, the whole property of one who has offspring."

"And what has been promised to another man, these have been declared to be inalienable by one in the worst plight even."

The natural interpretation of these verses would establish first this result, that under no circumstance whatever,—not even in distress, whatever Manu, Vasishtha, Yajnavalkya may say to the

1892
 ENI PRASAD
 v.
 HARDAI
 BIBI.

contrary,—can a son form the subject of a gift. One turns naturally and at once to the chapter on Inheritance and to that on the Duties of Husband and Wife to see how he will explain the recognition law of an adopted son. The result is disappointing. He mentions him only once, and that is when he is repeating the list of twelve sons given by Manu.

Thus it is easy to see why Narada excludes a son from being the subject of gift. The son is not an independent person, and as independence goes to the validity or invalidity of a contract, Narada boldly enunciates the proposition that the gift of a son at any time and under any circumstance is an invalid act ; he has no place for the doctrine anywhere that a son is requisite because of welfare in the spiritual world. With this writer the object and idea of a son is the continuation of lineage (see especially Chapter XII, v. 84).

We have now gathered two distinct ideas, the idea that a son is for victory over enemies and for continuing the line of ancestors, and therefore the man who has only one and gives him away in adoption commits an imprudent act. We have a second idea, that of Narada, that a son is a person under subjection and therefore cannot be made the subject of gift.

It is not till we reach Nanda Pandita that we come across the doctrine that the gift of an only son is an offence which threatens both giver and taker with the extinction of lineage. The text runs thus:—

इदानीं कोदृशः पुत्रोकार्थं इत्यत आह शौनकः ।

“ नैकपुत्रेण कर्त्तव्यं पुत्रदानं कदाचन ।

बहुपुत्रेण कर्त्तव्यं पुत्रदानं प्रयत्नत ” इति ॥

एक एव पुत्रो यस्येति ‘ एकपुत्रः ’ तेन तत् पुत्र दानं न कार्यम्, न त्वेवैकं पुत्रं दद्यात् प्रतिग्रहणीयादेति, वशिष्ठस्मरणात् ॥ अत्र स्वस्वत्वनिवृत्तिपूर्वक-परस्वत्वापादानस्य दानपदार्थत्वात् परस्वत्वापादानस्य च परप्रतिग्रहं विना-नुपपत्तेस्तस्याच्छिपति, तेन प्रतिग्रहनिषेधोऽपि अनेनैव सिध्यति ॥ अतएव-

वशिष्ठः । 'न त्वेवैकं पुत्रं दद्यात् प्रतिगृह्णोयाद्वेति' । तत्र हेतुनाह, 'स हि सन्तानाय पूर्वेषामिति' । सन्तानार्थत्वाभिधानेनैकस्य दाने सन्तानविच्छिन्नि-
प्रयवायो बोधितः । स च दाहप्रतिग्रहीचोरुभयोरपि उभयशेषत्वात् । यत्तु
स्मृत्यन्तरम् । "सुतस्यापि च दाराणां वशित्वमनुशासने । विक्रये चैव दाने च
वशित्वं न सुते पितुरिति" ॥ यच्च योगीश्वरस्मरणम् 'देयंदारसुतादृत' इति ॥
तदेकपुत्रविषयम् ॥ कदाचन, आपदि । तथाच नारदः, निक्षेपः पुत्रदारश्च
सर्वस्वश्चान्वये सति । आपत् स्वपि हि कष्टासु वर्तमानेन देहिना ॥
अदेयान्याहुराचार्या यद्यत्साधारणं धनमिति । इदमप्येकपुत्रविषयेव वशिष्ठ-
शौनकेकवाक्यत्वात् ॥

1892
BENI PRASAD
v.
HARDAY
BIBL.

The above text may be translated as follows :—

Now of what kind is the person who is suitable to be adopted as a son. On this point Saunaka says, "The gift of a son is not in any case to be made by a man having an only son. The gift of a son is to be made with readiness by a man having many sons." The meaning of the word *Eka Putra* is a man who has only one son, by him the giving of a son is not to be made. There is the Smṛiti of Vasishtha to the effect. "But he should not give or accept an only son." Now from the use of the word "gift" there arises the idea that the property of another is established after the previous extinction of one's own property, and also that property in another cannot be without acceptance. Saunaka implies all this. Therefore the prohibition against acceptance also is established by this text. This also says Vasishtha. "But he should not give or take an only son." For this he mentions a cause. "For he is for the prolongation of ancestors." Seeing that an only son is appointed for the purpose of prolonging ancestry, loss and destruction of such ancestry must be understood (to be) in the giving of him, and this is the case of both giver and acceptor for the reason follows the (case of) both.

There is another text of the Smṛiti. "The father has power in the matter of treating of a son and a son's wives, but he has not

1892
BENI PRASAD
v.
HARDAI
Bibi.

"power over the son in the matter of sale and gift." And there is the text of the Holy Saint. "There may be giving except a wife and son," and this refers to an only son. "In any case" means "In a time of distress." Thus Narada says, "A deposit, a son, a wife, the whole property of one who has offspring. And what is joint property these have been declared to be inalienable by one in the worst plight even.

This also refers to an only son according to the text of Vasishtha and Saunaka.

The authorities for this proposition are according to Nanda Pandita—Saunaka, Vasishtha, and Narada. The texts of the two latter have been already considered. Nanda Pandita views them very differently; the text of Vasishtha in his eyes establishes a prohibition against the gift of an only son. The text of Narada presents a difficulty, but he gets over it by an *ipse dixit* that Narada referred, when he wrote the text, to the case of an only son, and to no other. For this assertion of his he gives no authority of any kind.

The text of Saunaka is very emphatic. It runs thus in the Dattaka Mimansa.

नकपुत्रेण कर्तव्यं पुत्रदानं कदाचन

But there is one immense difficulty in considering the real meaning of this text. It stands a fragment which has been presented to us entirely detached from the context, and neither this library nor, as far as I know, any private person in Allahabad is in possession of a copy of Saunaka's text. Probably if we had the context we might find that the text was in harmony with the writings of Manu and Vasishtha. Mr. Mandlik in his book the Vyavahara Mayukha boldly maintains that this text as well as the other is purely a recommendatory one. I was not prepared to follow him, for so far as my study of Sanskrit had carried me this form of sentence did represent a strong imperative. Mr. Mandlik's knowledge of Sanskrit is however more wide and vast than any I can pretend to, and I find by reference to Whitney that the interpretation advocated

by Mr. Mandlik is one which that eminent grammarian and scholar would be prepared to accept. In section 999 of the grammar, he says that the gerundive used in the same construction as is adopted in this text not seldom has a purely future tense.

1892
BENI PRASAD
v.
HARDAI
BIBI.

The authorities then on which Nanda Pandita rests his prohibition do not when examined bear him out. He is so recent a commentator that his dicta can hardly pass unchallenged on the score of antiquity.

It is, moreover, not beyond doubt that Nanda Pandita himself may not have meant to lay down anything more than that the giving and taking of an only son was a fault and therefore to be avoided. There is a vast difference between this, in itself an advance upon the older texts, and between laying down the act as one interdicted by Civil Law.

The ground for holding that Nanda Pandita was not prepared to interdict the adoption of an only son are briefly as follows.—

A more particular examination of the text of the Dattaka Mimamsa shows that Nanda Pandita was in the habit of using when necessary the more positive forms of prohibition such as वे, see section IV, v. 67, and elsewhere, a fact which affords some ground for the contention that his dicta upon पुत्रीकाये do not amount to more than an enumeration of the “points,” if I may use the term, which an adopting father would seek in his adoptive son, and do not define an absolute incapacity in the giver, taker or subject even if such ideas were recognised by him. The whole argument contained in section IV is obscure and gets still more obscure as it proceeds. It is in sharp contrast to the crisp, well-arranged and well-defined dicta of Narada, and I have already pointed out the unblushing way in which the Pandit perverts Narad’s arguments into a foundation for his own proposition.

Again Nanda Pandita, in the section immediately preceding section IV, does deal with the case where the rule that a boy of a different caste should not be adopted has been transgressed. What is the result, the Pandit asks, of transgression, and his answer is not

1892
BENI PRASAD
v.
HARDAY
BIBI.

that the adoption is invalid, but that such a son is to be excluded from participation in the estate; he is, however, entitled to food and raiment from the adoptive or would-be adoptive father. This section III follows section II, in which the prohibition against such an adoption has been discussed. Section IV is followed by no similar question and answer.

Section V deals with the ceremonies of adoption, and concludes with a precept that where the ceremonies fail, the filial relation fails. The absence of any like precept in section IV can hardly be due to accident.

So much for internal evidence as to whether Nanda Pandita did or did not mean to interdict absolutely the adoption of an only son. That evidence is distinctly in favour of the proposition that he did not mean to interdict the act absolutely.

Now as to the authority to which the Pandit's work is entitled Mr. Colebrooke was pleased to term the *Dattaka Mimansa* "an excellent treatise on adoption;" but he does not appear to have pursued to any length the enquiry how far the author was a man entitled to weight or cognizant of local custom, especially when he made additions to or offered explanations of the texts of those whom we may term the Sanskrit Fathers. Mr. Sutherland writing from Monghyr in 1819 claims for the author that certain works of his other than the *Dattaka Mimansa* existed in much esteem. He maintains though not without apology that the *Dattaka Mimansa* is also held in estimation, by whom it does not appear. The arguments he allows are often weak and superfluous, the style frequently obscure and not un rarely inaccurate. The translator adds that the work has been compiled under circumstances affording little facility for enquiry or collecting information.

Now if I am asked to choose on a point of conflict between the authority of works like those contained in the first two groups of writers and the work of a man of modern times whose pretension to authority rests mainly upon the unsupported testimony of modern times and that testimony wavering and uncertain, my choice is made without hesitation and without difficulty.

The one justification for Nanda Pandita and his views, if we must accept them in the direction Mr. Banerji would advocate, is that local custom has pronounced against such an adoption and that so distinctly that even Manu himself would require a king to bow to the custom when administering law to his subjects. Is there any evidence in favour of this view?

1892

BENI PRASAD

v.

HARDAI

BIBI.

Now there is a certain amount of material, slight it may be, but still existing in this case, for the inference that the custom of Benares is not against the adoption of an only son. If it were, we should expect to find at the very least this result that Beni Prasad and his family are or have been put out of caste or have regained their caste by penance, for they are Agarwala Banyas by whom the idea of caste and religious observance is carefully cherished. Mr. Banerji does not for a moment pretend that any such effect has followed this adoption, and this in the very town where Nanda Pandita wrote his Dattaka Mimansa and where it is, we are told on authority, held in much esteem. Now in the Panjáb where custom on the question has been made the subject of judicial enquiry, the answer to the question has been that such an adoption is valid (1). No custom has been pointed out to or discovered by me which maintains such an alienation to be void.

Thus then after a careful examination of the text writer and commentators I find—

(1) That this Court in 1879 founded its ruling upon what would appear to be a correct and not a mistaken impression of the text of Hindu Law books.

(2) That no text writer, except it may be Nanda Pandita, gives any countenance to the view that the adoption of an only son would be to extinguish the lineage of the natural father and to deprive the ancestors of the natural son of the means of salvation.

(3) That such an adoption is not forbidden by the Hindu Law as current in these provinces.

(1) Panjáb Record No. 57 of 1881. Hoshnak v. Tarmal Singh.

" " " 43 of 1879. Majja Singh v. Ram Singh.

" " " 18 of 1870. Adjudhia Parshad v. Dewan (Musammat.)

1892

ENI PRASAD
v.
HARDAY
BIBI.

(4) I also find that, save in Nanda Pandita, so far as these provinces are concerned, there is no real foundation for holding that the subject of adoption is inseparable from the Hindu religion. Yajnavalkya and his commentator distinctly incline to an opposite view.

Lastly, I find no authority save a distorted gloss upon Narada for the idea that the father of an only son has no such absolute dominion over that son as to make him a subject of gift. The text of Narada does not apply to only sons, but to all sons alike, and is in direct opposition to texts many and various to be found in all the Dharmshastras cited to us.

It will be easily seen from the above that I am satisfied that Mr. Colebrook's translation is, as the learned Chief Justice has pointed out, in error, and the error is probably the cause why both Mr. Justice Dwarka Nath Mitter and Mr. Justice Markby were led into the opinions they formed. Mr. Justice Dwarka Nath Mitter, if he did follow Colebrooke's translation, appears to have done so without full regard to that translation as a whole. Sir Charles Sargent adopts Mr. Justice D. Mitter's view. Sir Charles Turner was no Sanskrit scholar; the Dattaka Mimansa and its translation evidently were at the root of his dissenting opinion in *Hanuman Dass versus Chirai*.

I have up to the present made little mention of the doctrine that because a son delivers his father from the region called Put, herefore we must infer that that adoption is inseparably bound up with the Hindu religion and the adoption of an only son must be null and void.

My silence is due to the fact that, as I have shown, the text writers do not put this argument forward when they are dealing with adoption as a question of civil law. To them the distinction between religious law and civil law was not, I venture to think, so obscure or immaterial as some would endeavour to maintain.

Nanda Pandita, admitted to be an "obscure and not unrarely "inaccurate writer," does mingle the two ideas and gets confused in

consequence. But Manu keeps them distinct and apart except in his ninth chapter, and the verse there to be found is generally believed by modern critics to be a verse 'really suspicious or clearly interpolated.' The verse I allude to is verse 138, and its authenticity has been suspected for more than a quarter of a century. That verse does say that because a son delivers his father from the hell called Put, he was therefore called Putra. But the theory of adoption as essential to the well-being of a family was earlier than the idea of *Put*, or of a son as necessary for the libations to the Manes. It had become a recognized means of continuing by a fiction the line of ancestors, and the element of religion was imported into it by the Brahmins when they gained ascendancy. The foundation of adoption on the theory of salvation is, I am confident, an error. The view, which my study of Sanskrit literature—leads me to think is the right view, as to the origin and growth of the law of adoption, has been well put by Mr. Sarvadhikari, an eminent Sanskrit scholar, in his Tagore Law Lectures. That writer when dealing with the subject says :—

“It is instructive to observe the feelings with which a son was regarded both in ancient and in mediæval India. In the hymns of the Rigveda a son was the delight of his father, and his birth was earnestly desired to continue the line of his progenitors.”

“The religious element had not yet entered into the conception of a son. The family would be destroyed and the mundane existence of a long continued line of ancestors would be obliterated, if no son were born in the family. Religion, in the Vedic age, concerned itself with higher things, and not with the birth and death of a male representative of the family. The theory of a region of eternal torments which a sonless man would inhabit was not yet invented. But there is ample evidence to show that the primitive sages of India most solemnly enjoined upon all their faithful followers, the duty of begetting a son, and thus maintaining the power and the honor of the family in which they were born.”

“In the later stages of the social progress, the birth of a son was felt as an *absolute* necessity, not only in this world, but also in the life to come. Religion had sanctified the natural craving, and the unfortunate man who was not blessed with a son in this world was doomed to a dark and fathomless abyss of eternal horrors.”

1892

BENI PRASAD

v.

HARDAI

BIBL.

1892
BENI PRASAD
v.
HARDAY
Bibi.

Put is not a region known to the Vedas. In the Aitareya Brahmana one Haris Chandra, who had no son, asks one Narada, "What do people gain by a son whom they all wish for, as well those who reason? as those who do not reason?" Here, if ever, was an opportunity to drag in the idea of salvation from *Put*, but the idea and the word is not even mentioned. Even the doctrine of payment of the three debts finds no place in Narada's answer.

As Brahminical views prevailed the idea of *Put* and adoption as bound up with adoption found places in the texts of the older writers, but that place was side by side with rites and ceremonies, not with law.

I do not and would not for a moment wish to be understood as holding that the doctrine that a son is a powerful instrument for securing future beatitude to his parents is not a doctrine current in these Provinces, or that an orthodox Hindu would accept my criticism on *Manu*, Chapter IX, v. 138. But even he will, I think, on reflection admit that the doctrine is a matter of religion not of the civil law, and it is not, as often supposed, a doctrine which maintains that the possession of a son is the only means of attaining salvation. The 12th chapter of *Manu* and other passages show that this is quite a mistaken view. See also *Vasishtha*, Chapter IX, sl. 12; and XXIX, sl. 3.

Nor must it be forgotten that Heaven and Hell are essentially foreign ideas, if they are understood to mean fixed states of happiness or torment. Supreme beatitude or *Moksha* is not made anywhere dependent solely upon the possession of a son. It seems to me therefore quite unnecessary to pursue this idea further.

For the reasons given above my answer would be that the adoption of an only son having taken place in fact, such adoption is not null and void under the Hindu law, and under these circumstances the remaining two questions call for no answer.

NOTE.—Except in the quotation at p. 98 from the judgment of the Privy Council in *Srimati Uma Deyi v. Gokoolanand Das Mahapatra*, the maxim "*Quod fieri non debet factum valet*" throughout the judgment of Edge, C.J., is erroneously printed as "*Quod fieri non debuit factum valet*." The substitution of "*debuit*" for "*debet*" was made by mistake and without his Lordship's authority.

APPELLATE CIVIL.

1891
December 8.*Before Mr. Justice Straight and Mr. Justice Knor.*

MUHAMMAD ZAHUR (PLAINTIFF) *v.* CHEDA LAL (DEFENDANT) *
Civil Procedure Code, s. 375—Act X of 1873 (Indian Oaths Act), s. 11—
Adjustment of suit.

The question in a suit was whether the purchase-money for a house, which had been paid by the defendant, had been paid out of his own funds or out of monies belonging to the plaintiff. A witness for the defence having made statements apparently favourable to the plaintiff's case, the pleaders for both parties signed and presented to the Court a petition that if upon a particular bond in the witness's possession it should be stated that the money was received through the defendant, the Court should decree the suit, otherwise the suit should be dismissed.

Held that this arrangement was not an adjustment or compromise of the suit within the meaning of s. 375 of the Civil Procedure Code, so as to determine the jurisdiction of the Court and necessitate its passing a decree according to the arrangement.

The Oaths Act (X of 1873) does not constrain a Court to pass a decision in favour of a particular party. If a party to a suit says he will be bound by the oath of a particular person, s. 11 of the Act only means that *pro tanto* he will be bound, *i.e.*, so far as the matter of that evidence is concerned, and that evidence will be conclusive as to its truth as against him throughout the whole of the litigation. But it in no way compels the Court trying the case to accept it as conclusive.

Vasudeva Shanbog v. Naraina Pai (1) approved.

THE facts of this case sufficiently appear from the judgment of Straight, J.

Mr. *Amiruddin* for the appellant.

Mr. *Conlan* and Babu *Rajendra Nath Mukerji* for the respondent.

STRAIGHT, J.—This second appeal relates to a suit brought by Cheda Lal, the plaintiff-respondent, against Muhammad Zahur, the defendant-appellant, to obtain possession of two-thirds of a house of which the plaintiff is admittedly the proprietor to the extent of one-third. The case for the plaintiff as stated in the plaint shortly was that Hulas Rai was the owner of the house, that he, the

* Second Appeal No. 1424 of 1888 from a decree of Maulvi Zain-ul-abdin, Subordinate Judge of Moradabad, dated the 6th August 1888, confirming a decree of Maulvi Muhammad Abbas Ali, Munsif of Nagina, dated the 15th May 1888.

(1) I.-L. R., 2 Mad., 353.

1891 plaintiff, had acquired one-third of it, and that in consequence of
 MUHAMMAD disputes between himself and Hulas Rai that person had refused to
 ZAHUR sell to him the other two-thirds. Consequently, said the plaintiff,
 v. "I had to get a third person to act in the matter as purchaser,
 CHEDA LAL. and that third person was Muhammad Zahur, the defendant, who
 is now in possession, but to whom I handed the purchase-price of
 the house, namely, Rs. 590, and who refuses to give me possession,
 alleging that he and not I was the purchaser of that two-thirds of
 the house."

The defendant denied the plaintiff's story and asserted that he was the purchaser of the house; that he found the money from his own proper funds, and that he paid it to Hulas Rai. It was upon that condition of facts as stated on both sides that the cause went to trial before the Munsif, and he stated certain issues for determination, into which I need not more particularly enter, because the main issue to be determined was, "did the defendant purchase the two-thirds of the house for and on account of the plaintiff and with his money, and was the amount paid by the defendant for the plaintiff Rs. 590."

The cause went to trial and a number of witnesses were called for the plaintiff, and witnesses were also called for the defendant. In the course of the trial, namely, upon the 12th April, a witness of the name of Maula Bakhsh was being examined on behalf of the defendant, and it was a matter to which he was deposing that the money paid by the defendant to Hulas Rai was the money of the defendant. He was apparently asked questions to show whether the plaintiff and defendant were not upon terms of intimacy such as might naturally lead the plaintiff to entrust the defendant with the task that he said he had entrusted him with. It was to be borne in mind that, according to the Munsif's judgment, a body of testimony had been given to show that such was the existing state of things. Upon the 11th April 1888, the pleaders for the plaintiff (Maula Bakhsh having then been apparently examined as a witness) put in a petition which professed to be filed on behalf of the plaintiff, and was signed by the plaintiff's pleader, and the pleader for the

defendent, and in that document there was a passage to the following effect, "that in the bond written by Salig Ram which is in the possession of Maula Bakhsh, if there be not the following words, namely, that the money was received through Muhammad Zahur, let the Court decide the case against the plaintiff in this suit, if the words are written, let the Court pass judgment for the plaintiff To this decision the parties have no objection."

1891

 MUHAMMAD
 ZAHUR
 v.
 CHEDA LAL.

Then there was an order made upon that document:—"the pleaders for the parties have put it before me and verified; it is ordered that Maula Bakhsh, the witness for the defendant now in Court, put forward the bond written by Salig Ram, the money of which Maula Bakhsh has paid and got the bond back."

Now it is important to my view of this case to see what the precise state of things was at that moment. Evidence had been given to show that the relations of the plaintiff and the defendant were of an intimate and very friendly character. Maula Bakhsh had been examined, and had made some admissions apparently favourable to the plaintiff's case and these pleaders, probably more in advertence to the credit to be attached to Maula Bakhsh than for any other purpose, entered into this arrangement, which was what? That if Maula Bakhsh produced, or did not produce, a particular bond for Rs. 435 which had been redeemed by Maula Bakhsh as the purchaser of the house, then the plaintiff would be discredited to that extent or the witness Maula Bakhsh would be discredited.

I, however, much regret that through mistake upon my part when this appeal was originally argued I did not precisely appreciate the nature of this particular document. I was under the impression, and my brother Knox says he was also under the impression, that it was a document which was mixed up with the payment of the alleged Rs. 590 by the plaintiff to the defendant Muhammad Zahur. It is in consequence of that confusion that the delay has taken place by reason of this remand order having been made. However, in my opinion it is fully competent for my brother Knox and myself, we having made no decree in this case as yet, to correct the mistake we fell into and to see

1891 that due justice is done to the parties irrespective of that remand order.

MUHAMMAD ZAHUR v. CHEDA LAL. Mr. *Amiruddin*, who supported the appeal, and who, both on the former occasion and the present occasion, has put forward every fair argument that could be used in support of his views, has contended that the moment the agreement of the 11th April 1888 was filed in Court and the moment Maula Bakhsh had been examined and produced the bond and the name of the defendant was found upon it, the jurisdiction of the Court to try the case ceased, and it had no alternative but then and there, upon that material alone, to proceed to decree in favour of the appellant.

I cannot agree with that view. I think it proceeds upon a misapprehension of the mode in which our Courts have to deal with a case under ss. 373 and 375 of the Code of Civil Procedure and a misapprehension of what is the true scope and operation of the Oaths Act of 1873. In my opinion, there being a suit pending in the Court of the Munsif, that suit could only be disposed of by a decree of some sort, either a decree passed upon the evidence and in reference to all the materials upon the record, or a decree passed upon an agreement for adjustment between the parties falling within the terms of s. 375, Code of Civil Procedure. Now I entirely agree with every word that is said by Mr. Justice Muttusami Ayyar in *Vasudeva Shanbog v. Naraina Pai* (1). The learned counsel for the appellant with his naturally acute mind omitted to notice that upon that particular agreement, as it stood, the Court could pass no decree, but something else had to be done, namely, the witness had to be examined, and Mr. Justice Muttusami Ayyar has clearly pointed out in that case that that makes a very considerable difference and removes agreements of such a character from being recorded as an adjustment within the meaning of s. 375.

But lest the learned counsel should suppose that I have not fully considered this matter, I will deal with it in the aspect of the Oaths Act, and, if he were to place his argument upon that statute, I would rule that the Oaths Act does not constrain a Court to pass a decision in favour of a particular party. If a party to a suit says,

(1) I. L. R., 2 Mad., 356

he will be bound by the oath of a particular person as read by the light of s. 11 of that statute it means no more than this, that *pro tanto* he will be bound, that is to say, in so far as the matter of that evidence is concerned, and that evidence will be conclusive as to its truth, and the truth of that evidence will be conclusive against him throughout the whole of that litigation. But it in no way compels the Court trying the case to accept that evidence as conclusive. It may act solely upon that evidence, and in many cases it would act wisely to do so. But on the other hand, it may be unwise in some cases to do so, for instance, where the evidence, as in the present case, is so vague as not to convey any satisfactory idea to the mind of the Court.

I do not think that the document of the 11th April 1883 was an adjustment of the suit between the parties within the meaning of s. 375 which compelled the passing of the decree in its terms, and consequently I do not think that the evidence of Maula Bakhsh was conclusive of the suit. That being so, I think there is nothing whatever to be said for this second appeal. The learned Subordinate Judge upheld the conclusions of the Munsif that the defendant bought the house for the plaintiff and that the plaintiff found the money with which the two-thirds of the house was purchased, and that therefore the two-thirds was the property of the plaintiff and the defendant had no right to resist his prayer for ejectment from those premises. I dismiss the appeal with costs.

KNOX, J.—I concur.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.

KADIR BAKHSH AND ANOTHER (APPLICANTS) v. BHAWANI PRASAD
(OPPOSITE PARTY).*

1892
January 5.

Insolvency—Procedure in case of dishonest applicant—Powers of the Court—Civil Procedure Code, ss. 350, 359—Construction of statutes—Reference to Statement of Objects and Reasons and to Report of Select Committee.

A Court is competent to take action under s. 359 of the Civil Procedure Code at the instance of a creditor, after the hearing under s. 350 has determined.

* Appeal No. 13 of 1891 under s. 10, Letters Patent.

1892

KADIR
BAKHSH
v.BHAWANI
PRASAD.

(*Per* STRAIGHT, J.—It is desirable that an application under s. 359 should be made immediately or as soon as possible after the hearing under s. 359, but a delay of some months will not make the application unentertainable.)

When once any of the frauds referred to in clauses (a), (b) or (c) of s. 359 have been proved at a hearing under s. 350, the Court must under s. 359 either itself pass sentence on the applicant who has committed such frauds, or must send him to a magistrate to be dealt with according to law. The Court has no option to decline to adopt either of these courses.

In acting under s. 359, the Court does not re-try the questions of fact decided by it at the hearing under s. 350, but has to proceed upon the findings come to at that hearing. An applicant for a declaration of insolvency who does not avail himself of his right of appeal from the order rejecting his application, is concluded by the findings of fact at the hearing under s. 350, and cannot afterwards question them.

In construing a statute the Court cannot refer to the Statement of Objects and Reasons attached to a Bill, or to the Report of a Select Committee, or to the debates of the Legislature, but can only look to the statute itself. *Queen-Empress v. Kartick Chunder Das* (1) and *Ramesh Chunder Sannyal v. Hiru Mondal* (2) dissented from on this point.

This was an appeal under s. 10 of the Letters Patent from the following judgment of Knox, J., in which the facts of this case are sufficiently stated for the purposes of this report:—

KNOX, J.—Karim Bakhsh and Kadir Bakhsh, the respondents in the application before me, applied to the Judge of the Court of Small Causes, Allahabad, exercising powers as a Subordinate Judge, to be declared insolvent. The learned Judge rejected their application with costs, and found on the 12th March 1890—

- (1) "that the applicants had concealed property of large value * * *"
- (2) "that it had been fully proved that they owned other property of much greater value than they had entered in their application to be declared insolvent;"
- (3) "that shortly before filing their application, the applicants had either concealed or sold off the bulk of the stock they had in one of their shops, and that they had done so with a view to prevent its being availed of by their creditors."
- (4) "that the applicants were guilty of fraudulent concealment and transfer in respect of some of their property."

(1) I. L. R., 14 Calc., 721.

(2) I. L. R., 17 Calc., 852.

One of the creditors, Bhawani Prasad, applied to the learned Judge and prayed him to exercise the power conferred upon him by s. 359 of the Code of Civil Procedure.

1892

KADIR
BAKHSI
v.BHAWANI
PRASAD.

The Court refused to exercise the jurisdiction vested in it by the Code. In passing the order of refusal no reasons for declining to exercise this jurisdiction are given, none of the findings at which the learned Judge arrived on the 12th March 1890 are questioned. He contents himself with recording "I am, however, of opinion that the present case is not one in which the applicants for insolvency should be dealt with under s. 359. That section certainly was enacted for the punishment of such applicants as were found to be guilty of gross acts of fraud or concealment. I do not think this can be said of the present applicants. I am therefore of opinion that this is not a case which the Court should exercise the powers vested in it by s. 359."

I have the greatest respect for the findings of the learned Judge, but I am clearly of opinion that s. 359 was framed expressly to meet the case of a person to whom the findings of 12th March 1890 apply. The respondents have in distinct terms been found guilty of concealment of wilfully making false statements respecting the property belonging to them, and of having fraudulently concealed, transferred or removed their property. After such findings duly placed on record, should any of the creditors, as in the present instance, press for an order under s. 359, the Court which recorded those findings has no option but to pass a suitable order under s. 359.

With the findings of fact I would not in any case as a Court of revision interfere, and all I have heard in the course of the prolonged arguments addressed to me by the learned counsel for the respondents has only convinced me that those findings were most sound and proper findings.

I accordingly set aside the order of the 19th September 1890, and direct that the case be returned to the Judge to pass proper orders under s. 359 of the Code of Civil Procedure. The application is granted with costs.

1892

KADIE
BAKSHI
v
BHAWANI
PRASAD.

From this judgment the applicants appealed under s. 10 of the Letters Patent.

Mr. *Amiruddin*, for the appellants.

The Hon. *G. T. Spankie* and *Munshi Ram Prasad*, for the respondent.

EDGE, C. J.—On the 5th August 1889 the two appellants before us in this Letters Patent appeal applied to a Small Cause Court Judge having powers to deal as a Subordinate Judge with the matter, to be declared insolvents. On the 12th March 1890 the Judge rejected that application, having found that the appellants had been guilty of fraudulently concealing and transferring property belonging to them. According to him such frauds were proved at the hearing which took place under s. 350 of the Code of Civil Procedure. In July 1890 the respondent here, who was one of their creditors, moved the same Judge to proceed and deal with these appellants under s. 359 of the Code of Civil Procedure. The Judge issued a rule calling on these appellants to show cause, and on the 19th September 1890 he discharged that rule on the ground, apparently, that he did not consider the frauds which these appellants had committed to have been of a very gross character. On application for revision by the creditor to this Court that application came before our brother Knox, and he, being of opinion that, it having been proved according to the judgment of the Judge at the hearing under s. 350 that the frauds had been committed by these appellants, the Judge was bound to proceed under s. 359 of the Code, set aside the Judge's order of the 19th September 1890, and directed him to pass proper orders under s. 359 of the Code of Civil Procedure. From that order of our brother Knox this Letters Patent appeal has been brought. It has been contended that the Judge had no power to proceed under s. 359 after he had made his order rejecting the application of these appellants to be declared insolvents. It has also been contended that it was discretionary with the Judge to proceed or not under s. 359 of the Code. It was further contended on behalf of these appellants that we were bound to look at the report of the reasons and objects of the Select

Committee of December 1886. It was also contended on behalf of the appellants that it was open to them now to question the correctness of the finding that the frauds referred to had been proved. As to the first contention, there is nothing in s. 359, or in any other part of the Code to which our attention has been drawn, which indicates that the Court cannot take action under s. 359 at the instance of a creditor after the hearing under s. 350 has determined. As to the second contention, as I read s. 359, when once any of the frauds referred to in clauses (a), (b) or (c) of s. 359 have been proved at a hearing under s. 350, the Court must adopt one of two courses prescribed by s. 359, that is, it must proceed to deal with the applicant who has committed those frauds by passing sentence on him itself, or it may send him before a Magistrate to be dealt with according to law. In my opinion, under such circumstances the Court has not got the option of declining to adopt either of these courses. As to the third contention, we have been referred to the case of the *Queen-Empress v. Kartick Chunder Das* (1) and the case of *Romesh Chunder Sannyal v. Hiru Mondal* (2). I have the greatest respect for the Judges who were parties to those decisions, but I must act on my own judgment in this matter. It appears to me that when a Court has to put a construction on a statute, whether of the Imperial Parliament or of the Legislative Council of India, it is the statute alone to which the Court is entitled to look. The principles upon which statutes have to be construed are the same whether in Courts of law or in Courts of equity, notwithstanding some mistaken views on that subject abroad. On that subject it is hardly necessary to say for the understanding of lawyers that that point has been concluded by the House of Lords. No doubt debates in the House of Commons or the House of Lords or reports of Special Committees, whether of one or other of these Legislative Assemblies or of the Legislative Council of India, are instructive historically if one has to consider, not what the statute says, but what may have been the motives of one or other party in promoting the legislation. If one were to refer to such debates and reports in order to ascertain

1892

 KADIR
BAKSH
v.
BHAWANI
PRASAD.

(1) I. L. R., 14 Calc., 721.

(2) I. L. R., 17 Calc., 852.

1892

KADIR
IAKHSHE
v
BHAWANI
PRASAD.

the true construction in law of a statute finally passed by the Legislature, it would be necessary to see whether any alteration took place between the time of the debate or the report and the final passing of the Bill into statute-law, and one would be construing the language of the report or the debate and not that of the statute. It is within one's own experience that parties to legislation sometimes fail so to express themselves in the statute as to carry out the intention they had in passing the statute, and that subsequent legislation is necessary in order by an amendment of the original statute to express in statute language the meaning of the Legislature. Another objection may be made that of two parties, members of the Legislature, who may approve of a Bill as drafted, neither of them may attach the same meaning to the wording of the Bill. In such a case what possible light could a reference to their opinions, when the Bill was passing into an Act, throw upon the true construction of the Bill as passed into statute-law? In my humble judgment, if Judges were to allow their minds to be influenced in the construing of a statute by debates in Parliament or reports of Select Committees or other bodies on the Bill, statute-law would be reduced to confusion, and instead of there being one principle of construction of statutes well understood by lawyers, the construction of statutes would be reduced to no principle at all. For these reasons I, for one, decline to look at the objects and reasons referred to by Mr. *Amiruddin*, and I do so because I wish to avoid affording what in my opinion would be a bad precedent in this Court. As to the last contention on behalf of the appellants, that it was open to them now to question the correctness of the findings of fact of the Judge at the hearing under s. 350 of the Code, I am of opinion that they are concluded by those findings. They had a right of appeal against the order rejecting their application to be declared insolvents, but they did not avail themselves of it, and the time has long gone by when they could question those findings. Where a Judge proceeds under s. 359 of the Code, he does not proceed to re-try the questions of fact already decided by him at the hearing under s. 550, but he has to proceed upon the findings which were come to by him at that hearing. For the reasons which I have

stated, I agree with my brother Knox that the Judge was bound to take action under s. 359 in one or other of the manners specified in that section, and I would dismiss this appeal with costs.

1892

KADIR
BAKSH
v.
EHAWANT
PRASAD.

STRAIGHT, J.—As the points raised in this appeal are somewhat novel, and as incidentally a contention has been put forward by the learned pleader for the appellants to adopt which would, in my opinion, be to sanction a most mischievous precedent, I think it right to add a few words to what has fallen from the learned Chief Justice. It seems to me that the argument for the appellants really resolves itself into two heads, first, that the Subordinate Judge had no jurisdiction to take up this matter, he having on the 12th March 1890 declined to allow the petition of insolvency, and secondly, that under s. 359 the Subordinate Judge had a discretion and was entitled to refuse on certain findings already recorded by him to punish the appellants. It will be convenient shortly to trace the proceedings under Chapter XX of the Code of Civil Procedure. That chapter provides that any judgment-debtor arrested in execution of a decree, or against whom an order of arrest has been made, may apply in writing to be declared an insolvent, and in that application he is bound, amongst other matters, to state the amount, kind and particulars of his property and the value of such property not consisting of money, his willingness to put it at the disposal of the Court, the amount and particulars of all pecuniary claims against him, and the names and residences of his creditors, so far as they are known or can be ascertained by him. Other matters I need not refer to. That application has to be signed and verified in the same manner as a plaint, and therefore he is bound in that application to speak the truth. Now what is the procedure which the Court then has to adopt? Having read the application it is to fix a date for hearing, and it is to issue notice to the creditors of the applicant informing them of the application and of the date of hearing. Now comes the important section, viz., s. 350, which provides for what is to take place at the hearing, and among other matters the Court is directed to examine the judgment-debtor and to hear all persons properly entitled to be

1892

KADIE
BAKSH
v.
BHAWANI
PRASAD.

heard in that proceeding; therefore not only in his application but in his examination is the applicant afforded every opportunity of making a full statement as to the matters referred to in the application. S. 351 is a section the peculiar framing of which has often given considerable difficulty to me and I believe to other Judges. This much, however, is certain, that no such application shall be granted, on the contrary, it shall be refused, if the Court is not satisfied as to the various matters contained in that section. Now it was under s. 350 that the learned Subordinate Judge, acting on the petition of these appellants, held various proceedings which culminated in his order of the 12th March 1890, and I am bound to presume that every act done was rightly done, and that when he rejected the application he did so on materials which satisfied him that the applicants had committed some or all of the acts mentioned in the section. Be that as it may, the appellants did not avail themselves of the right of appeal which they had under the law, and I entirely concur with the learned Chief Justice that behind those findings the Subordinate Judge at a later period was not entitled to go. Now Mr. *Amiruddin's* first point of jurisdiction is that contemporaneously with the Judge's order of refusal of the 12th March 1890, an application should have been made under s. 359 and should have been dealt with by that order, and that when once the Subordinate Judge had made that order his power under the chapter came to an end and he was not entitled to listen to any of the creditors. There is nothing in the statute to warrant that contention. I agree with the learned counsel that it is better that an application to a Court refusing an application of insolvency to proceed under s. 359 should be made immediately, or as soon as possible, but that is a long way from holding that when the respondents applied in July 1890 to the Subordinate Judge to enforce the provisions of s. 359 he was without jurisdiction to entertain that application. Then comes the point of discretion. Now it may well be that in some cases the word "shall" is used (as for example in the case of the words "shall be lawful") merely to confer on a Court a power which did not exist before, leaving it to that Court to exercise a discretion. So it may happen that in a statute the

word "may" may be used in such a way as to create a duty that must be performed, but in this s. 359 there can be, in my opinion, no doubt that the word "shall" as used there, and strongly contradistinguished from the word "may" used after, is used in an imperative and mandatory sense. Why I think so is that the section commences with the words:—"Whenever at the hearing under s. 350 it is proved." Now it seems to me that when the requirements of s. 350 have been satisfied and the examination of the applicant and the other requirements of that section have been concluded and there is sufficient proof on the record to warrant the Court refusing the application under s. 351, no option is left to the Court, if a creditor or the creditors apply to it to exercise its jurisdiction, but it must do one of two things, either it must act on the materials on that record taken before itself and then and there punish the applicant who has sought to mislead the Court by a dishonest application or by dishonest proceedings in regard to it, or must send the applicant before a Magistrate to be dealt with in the ordinary course of law. If, as Mr. *Amiruddin* suggests, s. 359 intended that the Court should hold a fresh and full inquiry into all the circumstances again, it is a most singular fact to my mind that assuming its conclusions to be adverse to the applicant, he, under s. 588 of the Code of Civil Procedure, has no right of appeal. I infer from that that what was intended by the Legislature to be appealable was the result of the proceedings under s. 350 in regard to proof that the applicant had done certain specific acts. I have only one more word to add, and I am glad that the learned Chief Justice has spoken with no uncertain voice on the subject, namely, that I entirely and completely dissent from the view that Judges in administering the statute-law are entitled to refer for guidance either to speeches in Parliament or in the Legislative Council of this country or to reports made by Select Committees of that Council in reference to proposed legislation. Our business is to administer the law as we find it on the statute book, and not to endeavour to ascertain what this or that gentleman, no matter how eminent he may be, intended to be the statute-law. We must take his intention from the words found in the section, and to

1892

KADIR
BAKHSH
v.
BHAWANI
PRASAD.

1892
 KADIB
 BAKHSH
 v.
 BHAWANI
 PRASAD.

accept any other principle or rule of construction would be to introduce an amount of confusion and uncertainty into the administration of justice that would be most undesirable. I believe it to be an axiom that the body of a Bill is not to be construed by its preamble, or, to put it more guardedly, if the preamble provides for a wider mischief than the Bill in its sections enacts, you are not to give those sections a wider scope than their language properly interpreted justifies. I think my brother Knox was right in holding that the Subordinate Judge, having held on the 12th March 1890 that certain facts were proved in regard to the appellants, had no discretion when moved by the respondent but to proceed to inflict such punishment as he considered adequate to the misconduct of the applicants in regard to the application they had made to the Court, provided that he did not exceed the term of punishment allowed by the section. I dismiss the appeal with costs.

Appeal dismissed.

FULL BENCH.

1892
 January
 21st.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Mahmood, and Mr. Justice Knox.

BINDESHRI NAIK (PLAINTIFF) v. GANGA SARAN SAHU AND ANOTHER (DEFENDANTS).

Civil Procedure Code, s. 559—Addition of a respondent by the Court—Limitation.

Held by the Full Bench that it is competent to a Court acting under s. 559 of the Code of Civil Procedure to add a person as respondent in an appeal though the time within which an appeal might have been preferred as against such person has expired.

THIS was a reference made to the Full Bench by Edge, C. J., and Mahmood, J. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgment of Edge, C. J.

Pandit *Sundar Lal*, for the appellants.

Babu *Jogendra Nath Chaudhri*, for the respondents.

EDGE, C. J.—The question referred to the Full Bench is whether a person brought in as a respondent to an appeal on an order made under s. 559 of the Code of Civil Procedure is entitled to have the appeal as against him treated under the Indian Limitation Act, 1877, as if it were presented on the day on which the order of the appellate Court making him a respondent was passed. The question is quite apart from any question of limitation which might arise in the case of a person made a party to the suit by an order passed under s. 32 of the Code of Civil Procedure, and in the answer which I now propose to give to this reference I wish it to be distinctly understood that I am confining myself to the simple question before me and expressing no opinion as to the limitation to be applied in the case of an order made under any other section of the Code. In this particular case the Bench which was hearing the appeal was satisfied that one of the plaintiffs, viz., one Moti Gir, who was not made a party to the appeal, was a person interested in the result of that appeal, and being of that opinion that Bench directed notice to go, and ultimately Moti Gir was added as a respondent to the appeal. At the time when he was added as a respondent to the appeal the period of limitation within which an appeal could have been presented as against him had elapsed. On the further hearing of the appeal it was objected that, so far as Moti Gir was concerned, the appeal was time-barred. Now it appears to me that the power of the Court to act under s. 559 is only limited in two respects, first, the person whom the Court may add under that section must have been a party to the suit, and secondly, he must be a person interested in the result of the appeal. When I turn to the Indian Limitation Act of 1877, I find no period of limitation specified for the action of the Court in that matter. Whether s. 22 of the Indian Limitation Act read with s. 4 of that Act would apply to the case of a person brought in under s. 32 of the Code of Civil Procedure after the period of limitation, I need not consider. There may be a difference, so far as limitation is concerned, between the action of a Court under s. 559 and under s. 32. There is a wide difference between the wording of those two sections, particularly as to the

1892

HINDESHRI
NAIK

v.

GANGAI

SARAN SAHU.

1892
BENDESHI
NATH
v.
GANGA
SARAN SAHU.

grounds upon which a person may be brought in as a party. S. 544 shows that in a case falling within that section a Court can in appeal afford relief to a person such as is referred to there, although that person was not an appellant in the appeal, and although at the time when such relief was granted such person could not have preferred an appeal by reason of limitation. For the above reasons, and confining my judgment strictly to s. 559, I answer this reference by saying that there is no bar of limitation in regard to the hearing of the appeal as against Moti Gir.

STRAIGHT, J.—I am entirely of the same opinion.

MAHMOOD, J.—I also am of the same opinion and all the more willingly, because all that has fallen from the learned Chief Justice I understand to be in full accordance with my judgment in the case of *Sohna v. Khalak Singh* (1) where I discussed the scope of the powers exercisable under s. 559 of the Code of Civil Procedure as to respondents, and endeavoured to show how the exercise of those powers, so far as limitation is concerned, is distinguishable from the somewhat analogous powers exercisable by Courts of first instance under s. 32 of the Civil Procedure Code, with reference to defendants.

KNOX, J.—I agree with the learned Chief Justice and my brother Judges in the answer which they have given to this reference.

1892
January
21.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Mahmood, and Mr. Justice Knox.

RAMKALI (PLAINTIFF) v. KEDAR NATH AND ANOTHER (DEFENDANTS).

Limitation—Suit by daughter entitled to possession of immoveable property on death of Hindu widow—(Act XV of 1877), Limitation Act, sch. ii, art. 141.

The daughter of a separated Hindu, who was entitled to succeed to her father's immoveable property upon his widow's death, instituted, after the widow's death, a suit for possession of such property against certain persons who, upon the Hindu's death, had obtained possession and held it adversely to the widow.

Held by the Full Bench that art. 141 of sch. ii of the Limitation Act (XV of 1877) was applicable, and that limitation ran from the date of the widow's death. *Srinath Kur v. Posunno Kumar Ghose* (2) followed.

(1) I. L. R., 13 All, 78.

(2) I. L. R., 9 Calc, 934.

This was a reference to the Full Bench by Straight and Knox, JJ. The facts of the case are sufficiently stated in the referring order, which is as follows :—

STRAIGHT, J. (Knox, J., concurring)—The facts out of which the question of law arises are as follows :—

One Ram Sahai, to whom it is admitted the property in dispute originally belonged, died in the year 1862, leaving behind him a widow, Musammat Phulesari and a daughter, Musammat Ram Kali. It is contended for the plaintiff that he was separate, and that succession to the property left by him should have gone to his widow, and after her to his daughter. It is found as a fact that the widow never had any possession at all, but that from the time of the death of Ram Sahai his nephew Janki, father of the present minor defendant Kedar Nath, took possession of the property and continued to hold it, and that property is now in the possession of the minor defendant. Musammat Phulesari died in September 1887, and the present suit was instituted on the 18th November 1887, and by it the plaintiff seeks to have her right to the property declared and possession of it given to her. Both the lower Courts have dismissed the plaintiff's claim, upon the ground that it is barred by limitation, in that the defendant and his father before him have acquired a prescriptive title by adverse for a period of more than twelve years. It is contended by Mr. *Ghulam Mughtaba*, upon the authority of a Full Bench of the Calcutta High Court in *Srinath Kur v. Prosunno Kumar Ghose* (1), of a decision of the Madras High Court, *Sambasiva v. Ragava* (2), and of the Bombay High Court in *Cursandas Govinaji v. Fundravandas Purshottam* (3), that the Courts below wrongly applied the principle of adverse possession to the facts of the present case, and that the plaintiff, under article 140 or 141 of the Limitation Act, was entitled to institute a suit, either upon the date when in the character of a reversioner the estate fell into her possession, or as a party, who on the date of the death of a Hindu female was entitled to possession of immoveable property.

1892
RAM KALI
v.
KEDAR
NATH.

(1) I. L. R., 9 Cal., 934.

(2) I. L. R., 13 Mad., 512.

(3) I. L. R., 14 Bom., 482.

1882
 RAM KAILASH
 v.
 KEDAR
 NATH.

On the other hand, Mr. *Kashi Prasad* has relied upon some remarks of their Lordships of the Privy Council in *Anumritolal Bose v. Rajonackant Mitter* (1), and *Sarodu Soondury Dossee v. Doyamoyee Dossee* (2), and reference has also been made to two rulings of my brother Tyrrell and myself in *Adi Deo Narain Singh v. Dukharan Singh* (3), and *Ghanaharp Singh v. Lachman Singh* (4).

I am disposed to think that the current of authority in this Court has always been to regard possession held adversely to the widow otherwise entitled to possession of her deceased husband's estate, as running, not only against the widow but against the reversionary heir or heirs. As, however, there is the Full Bench ruling of the Calcutta High Court and the rulings of two other High Courts taking a contrary view, and the point is one of considerable importance upon which, if possible, uniformity of decision should be secured, I think it would be best to refer for the consideration and reply for the Full Bench the following question :—

Does possession of the estate of a deceased separated Hindu held adversely to his widow entitled to its possession, operate for the purpose of constituting adverse possession to the reversioner or reversioners entitled to succeed upon her death to that estate?

Maulvi Ghulam Mughtabr, for the appellant.

Munshi Kashi Prasad, for the respondents.

EDGE, C. J.—The question referred to us is :—“ Does possession of the estate of a deceased separated Hindu held adversely to his widow entitled to its possession, operate for the purpose of constituting adverse possession to the reversioner or reversioners entitled to succeed upon her death to that estate? ” The facts as stated in the referring order are, that one Ram Sahai was the owner of the immoveable property in suit, and that he died in 1862, leaving behind him a widow, who died in 1887, and a daughter, the plaintiff, who brings this suit for possession. Ram Sahai was a separated

(1) L. R., 2 I. A., 113.

(2) I. L. R., 5 Cal., 938.

(3) I. L. R., 5 All., 532.

(4) I. L. R., 10 All., 185.

Hindu, and assuming that the referring order correctly states the facts, his brother's son, on the death of Ram Sahai, entered into possession of the property, and that nephew and his son, Kedar Nath the defendant, after the death of the nephew, continued in possession up to the time of the suit. There is no question of an alienation here; it is a simple question of whether the plaintiff is barred by limitation from bringing this suit for possession—the possession of the defendant and his father being, according to the referring order, adverse, and without title unless title was obtained by limitation. There have been conflicting rulings on this point. There is a Full Bench decision of the High Court at Calcutta in *Srinath Kur v. Prosunno Kumar Ghose* (1) in which it was held that under art. 141 of sch. ii of Act XV of 1877, a Hindu reversioner who succeeds to immoveable property has twelve years within which to bring his suit for possession from the time when his estate falls into possession. It is quite plain from the dates that Act XIV of 1859 does not apply to this case. The article of the second schedule of Act IX of 1871 which would, I think, have applied, if that Act had not been repealed by Act XV of 1877, is the same in terms as art. 141 of sch. ii of Act XV of 1877; Consequently, if either of those articles applied, having regard to the dates, this suit was within time. I am of opinion that art. 141 does apply expressly in this case, and that the twelve years began to run from the death in 1837 of the widow of Ram Sahai and consequently that the suit is within time. In order not to be misunderstood, I desire to say that I express no opinion as to the article of sch. ii of the Limitation Act which might apply if in this suit the plaintiff in order to succeed had to get rid of, for example, an adoption, an alienation or a deed. Until the question arises I will reserve my judgment on that point. That is my answer to the question referred.

STRAIGHT, J.—The suit here was precisely one of the character contemplated by art. 141 of sch. ii of the Limitation Act, 1877. The plaintiff was a Hindu female entitled to the possession of immoveable property at the death of her mother. Until the death

1892
 RAM KALI
 v
 KEDAR
 NATH.

(1) I. L. R., 9 Calc., 934.

1892
 RAM KAIL
 v.
 KEDAR
 NATH.

of her mother she had no title to possession. We are told that the article as to adverse possession is only to be applied to a suit where there is no other article applicable to the kind of suit. Here, there is art. 141 which is naturally applicable, and I think it should be applied; and I agree with the view expressed by the Calcutta High Court in the case reported in I. L. R., 9 Cal., 934. I only wish to add as to the two cases reported in I. L. R., 5 All., 532, and I. L. R., 10 All., 485, that, as to the first, no question of limitation arose, and as to the second, it was not argued that the possession held adversely to the widow was not adverse to the reversionary heirs; on the contrary, it was conceded in argument that it was. I accordingly answer this reference in the same way as the learned Chief Justice.

MAHMOOD, J.—I have arrived at the same conclusion as the learned Chief Justice and my brother Straight in answering the question enunciated in the order of reference made by my brother Straight with the concurrence of my brother Knox on the 21st December 1891, and in what I am going to say now my remarks will proceed on accepting the facts therein stated as the grounds of my judgment.

The present suit was begun on the 18th of November 1887, so that according to the law as it then stood the limitation applicable is that prescribed by Act XV of 1877. The law of limitation as laid down in that enactment as also in the two preceding enactments, viz., IX of 1871 and XIV of 1859, has two aspects, the principal one being that of laying down rules of law *ad litis ordinationem* giving the limits of the time within which a remedy may be sought for in a Court of justice, and the second being that of laying down rules *ad litis decisionem* or rules of substantive law regulating one of the modes of acquisition of ownership, viz., by prescriptive title.

Now, in the present case the date of the suit having been noticed by me and the title of the plaintiff as asserted by her never having been tried on the merits, her suit could fail only in one of the two ways which I have above described, viz., either by showing that by dint of the lapse of the prescriptive period her title had vanished

or by showing that her suit as a matter of seeking remedy was barred by law. 1832

Now on the facts as stated in the order of reference Ram Sahai died some time in 1862. The lapse of twelve years from that date would bring such property as he left behind him to about the year 1874, when the Limitation Act of 1871 had already come into force, so that it seems to me clear on the facts that the plaintiff's title could not have vanished by reason of anything in that enactment, because art. 142 of sch. ii of that Act, corresponding to art. 141 of sch. ii of the present Limitation Act, leaves no doubt in my mind on that matter.

RAM KALI
v.
KEDAR
NATH.

It follows from what I have said that at the date of the present suit, viz., the 18th November 1887, the question of prescriptive title, such as is asserted against the plaintiff, is governed by the present Limitation Act of 1877, and the learned Chief Justice and my brother Straight have already explained that in this aspect of the case art. 141 of the present Act leaves no room for doubt [as the Calcutta Court in the case of *Srinath Kur v. Prosunno Kumar Ghose* (1) have held] that the present suit was not barred by limitation. As to the prescriptive part of the defence, that again rests on s. 28 of the present Limitation Act, but that section again turns us back to the periods mentioned in sch. ii of that Act read with the rules in the body of the enactment. For these reasons my answer to the reference is the same as that of the learned Chief Justice and my brother Straight.

KNOX, J.—I agree with the learned Chief Justice as to the answer which should be returned to this reference and have nothing further to add to the judgment delivered by him.

(1) I. L. R., 9 Calc., 934.

1892
February 19.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrel.

THE COLLECTOR OF ETÁWAH (DEFENDANT) v. BETI MAHARANI
(PLAINTIFF) *

Mortgage—Bond stipulating for recovery of loan “from my moveable and immoveable property”—Such instrument not a mortgage—Limitation—Act XV of 1877 (Limitation Act), sch. ii., arts. 66, 116—Attachment of debt before judgment—Civil Procedure Code, ss. 485, 486, 268 (a)—Act XV of 1887, s. 15—Injunction or order staying a suit.

A bond containing the stipulation “that if the principal and interest is not paid up at the stipulated period, then the obligee will be at liberty to recover the whole of his money together with the interest fixed by instituting a suit from my moveable and immoveable property, in my own ‘milk’” does not create a mortgage upon any property of the obligor.

To such a bond art. 66 of sch. ii of the Limitation Act (XV of 1877) is applicable; but where the instrument is registered, art. 116 may be applied to a suit for failure to pay the bond debt.

An attachment before judgement under s. 485 read with s. 486 and s. 268 (a) of the Civil Procedure Code, of a debt secured by a bond; or an injunction obtained by a third party and restraining the attaching creditor from subsequently bringing the bond to sale in execution of his decree; is not an injunction or order staying the institution of a suit upon the bond by the obligee, within the meaning of s. 15 of the Limitation Act. *Shib Singh v. Sita Ram* (1) followed.

The facts of this case are sufficiently stated in the judgment of Straight, J.

Mr. A. H. S. Reid, for the appellant.

Mr. W. M. Colvin, for the respondent.

STRAIGHT, J.—The plaintiff-respondent at a sale in execution of a decree on the 7th March 1887, purchased the bond upon which the present suit has been brought. That instrument is dated the 20th June 1876, and it was executed by one Lala Laik Singh, in favour of Kishen Das, the proprietor of the firm of Gopalji Kishen Das, bankers, of Etáwah. The amount borrowed was Rs. 7,000 the due

* First appeal No. 331 of 1889 from a decree of Babu Ganga Saran, Subordinate Judge of Mainpuri, dated the 8th April 1889.

(1) I. L. R., 13 All., 76.

date was the 1st November 1876, and the interest stipulated for was at the rate of Re. 1 annas 8 per cent. per mensem. That bond was not paid upon the due date, and the present suit was instituted upon it on the 6th November 1888, that is to say, five days beyond twelve years from the due date of the bond. The defendant-appellant in the suit, namely, the Collector of Etáwah, as representing the Court of Wards, is in possession of the estate of Lala Laik Sing, Lala Laik Singh has been for some time deceased, and the present owner of the estate is Lala Pirthi Singh, his nephew, who is a disqualified proprietor by reason of his unsoundness of mind. One Musammat Thakurani Raj Kuar is the wife of Lala Pirthi Singh, and she has been treated as Sarbarahkar of her husband's estate by the Court of Wards.

1892

THE COL-
LECTOR OF
ETÁWAH
v.
BETI MAHA-
BANI.

The suit of the plaintiff is met by the plea of limitation, and that plea proceeds upon the interpretation which the defendant contends should be placed upon the language of the bond of the 20th June 1876. If it creates a mortgage of immoveable property, admittedly the suit is within time, if it does not create a mortgage of immoveable property, then either art. 66 or art. 116 of the limitation Act is applicable, and in the aspect of either of those two articles, the suit is barred, unless the plaintiff is entitled to pray in aid certain acknowledgments made on behalf of the obligor, which would come within the meaning of s. 19 of the Limitation Act. It is obviously necessary, therefore, in the first place to examine the language of the bond of the 20th June 1876, in order to see if it does create a mortgage upon immoveable property. I presume there can be no question that an instrument that is so obscure and indefinite in its terms as to be incapable of having effect given to it, must be treated as void for uncertainty. In the case of *Shadi Lal v. Thakur Das* (1) I said what I had to say upon this subject, and I took occasion then to refer to a ruling of the learned Chief Justice and my brother Tyrrell in *Ramsidh Pande v. Balgobind* (2) as to which I remarked that it seemed to me to have gone as far as it was possible to go. In the present

(1) I. L. R., 12 All., 175.

(2) I. L. R., 9 All., 153.

1892 instrument the words are:—"I do not hereby agree that if the principal and interest is not paid up at the stipulated period, then the obligee will be at liberty to recover the whole of his money, together with the interest fixed by instituting a suit from my moveable and immoveable property, my own 'milk,' I will offer no objection, hence this bond has been executed that it may serve as a document."

THE COL-
LECTOR OF
ETAWAH
P.
DETI MAHA-
RANI.

It is contended for the plaintiff that we should regard these words as amounting to a covenant of mortgage, and that "my immoveable property" is sufficient to satisfy that condition. It appears to me that the language of this instrument is far too vague to hold any such view or to warrant the inference that we are asked to draw that the parties at the time that instrument was made contemplated the creation of a mortgage of a definite estate. The terms really come to no more than this, that if the money is not paid up upon the due date the obligee will be entitled by due process of law to recover the amount of the debt which became due by breach of the obligation. I am therefore of opinion that this bond of the 20th June 1876, did not constitute a mortgage within the well-understood meaning of the term.

That being so, it seems to me the instrument was no more than a single bond to which in direct terms art. 66 of the Limitation Law would be applicable, the date for payment being mentioned in the bond; but, accepting the view that has always been adopted in that Court in such matters, that, where the instrument is registered, art. 116 may be properly applied, and that the suit for the failure to pay the bond debt may be regarded as in the nature of one for compensation in damages for such failure to pay, I readily apply that article. That being so, the suit should have been brought within six years from the 1st November 1876. But, as I have stated, it was not brought until the 6th November 1888, and in view of these facts it is barred. But it is contended for the plaintiff that by a deposition made by one Ajudhia Prasad, on the 14th October 1882, an acknowledgment of liability in respect of this bond debt was given by which the defendant as representing the estate of the original obligor is bound.

With regard to the authority of Ajudhia Prasad I was at first somewhat inclined to doubt whether he was a duly authorized agent for the purposes of making that acknowledgment. But upon examining the terms of the power-of-attorney of the 12th April 1880, made by the Sarbarahkar and wife of the disqualified proprietor in favour of that person, and to the circumstances in connection with this property, I think it may, perhaps, be inferred, that he was entitled to make such an acknowledgment, and that Lala Pirthi Singh, the disqualified proprietor, is bound by that acknowledgment. But supposing this authority to be, as I have said, one that would bind the disqualified proprietor, it would still be insufficient to prolong the period of limitation up to the date when the suit was in fact brought. The mode in which the plaintiff gets out of this further difficulty is by contending that a notice issued by the Collector of Etáwah on the 12th April 1888, was another acknowledgment on behalf of the disqualified proprietor of the existence of this debt. It becomes important to see exactly the circumstances under which that notice was issued. It purports to be signed and was signed in fact or initialled rather by the Collector of Etáwah, and in the deposition which he made in March 1889, a print of which is upon this record, we are very clearly informed as to the precise circumstances that were present to him at the date of his issuing that notice. He says in effect that at that time he was inquiring into the question as to whether a petition of the wife of the disqualified proprietor that the estate should be taken under the Court of Wards should be acceded to, and he says when asked this question :—" Did you by this order of the 12th April 1888, marked A, mean directly or indirectly to admit the debt of any creditor ?" " I did not up to that time know even the names of the creditors of the *riyat*. I came to know within three months from the 7th April 1888, that there was one other bond in the name (in favour) of Gopal Jai Kishen Das." What I mean is :—" How much money Rani Kishori claims against the Harchandpur estate on the basis of the bond, which document was in the name of Gopal Jai Kishen Das ?" " Up to

1892

THE COL-
LECTOR OF
ETÁWAH
v.
BETI MAHA-
RANI.

1892 the 12th April 1888 I was not aware of any particular document of debt. My object in passing that order was to know what was the amount of the debt and who were the creditors. I do not think I have power to settle any debt without the sanction of the Board. I wrote to the creditors that what I had settled was with the sanction of the Board, and I made a report of that to the Board also. Information of the Harchandpur estate having been placed under the Court of Wards was received in the Collectorate of Etáwah from the Board on the 7th April 1888, and that very order contained a direction that a report should be made after ascertaining a detail of the debts, and under this order the order of the 12th April 1888 was issued."

THE COL.
LECTOR OF
ETÁWAH
v.
BENI MAHA-
RANI.

I find myself wholly unable to hold that upon this state of facts which must be borne in mind in order to gather the meaning of the language of the notice of the Collector of Etáwah, he in the sense of s. 19 of the Limitation Act admitted any liability on behalf of the disqualified proprietor in respect of the debt due under the bond made by Laik Singh in favour of Kishen Das. The suit in my opinion is barred by limitation.

But it is further contended, and this upon the strength of the view taken by the learned Subordinate Judge, that in reference to certain litigation that went on between the parties, the plaintiff as the purchaser of the bond in suit under the execution sale of March 1887, is entitled to allowance for the considerable period of time during which those proceedings were pending. The learned Subordinate Judge has given the plaintiff the benefit of the period which elapsed from the 17th May 1881 to the 7th March 1887, and no doubt, if that concession were to be made in her favour her suit would be within time. But it is necessary to examine the precise nature of the facts upon which the learned Subordinate Judge came to this conclusion, in order to see how far in law it is warranted.

I have stated that the bond of the 20th June 1876 was made by Laik Singh in favour of Kishen Das. It appears that on the 5th May 1881, one Rani Kishori, who had an account with the firm of

Gopalji Kishen Das, of which Kishen Das, the obligee, was one of the members, instituted a suit for an account of her dealings with that firm, and on the 17th of the same month she obtained an order of attachment before judgment under s. 485 of the Code of Civil Procedure. On the 20th September 1881, she obtained a decree and threatened with sale in execution the bond which had been so attached. One Kirpa Dial then brought a suit for a declaration of his title to the bond upon the allegation that it had been assigned to him by the obligee on the 17th April 1881. On the 21st August 1882, Kirpa Dial got an injunction directed to Rani Kishori, the successful decree-holder in the other suit, restraining her from bringing to sale in execution of her decree the bond of the 20th June 1876. The suit of Kirpa Dial was dismissed by the first Court on the 7th June 1884, and an appeal was preferred to this Court from that decision by Kirpa Dial, pending the determination of which appeal Kirpa Dial came to this Court, and I, by an order of the 4th August 1884, granted a fresh injunction restraining Rani Kishori from selling the bond. The appeal of Kirpa Dial was subsequently dismissed, and in execution of Rani Kishori's decree the bond of 20th June 1876 was sold upon the 7th March 1887, and was purchased by the plaintiff-respondent, and this is the title upon which she comes into Court. The learned Subordinate Judge has treated the period from the date of the attachment of the bond by Rani Kishori in her suit, viz., the 17th May 1881, to the date of the purchase by the plaintiff, on the 7th March 1887, as a period during which by reason of the attachment and injunction the party entitled to recover the amount of that bond was prohibited from putting that bond into suit and recovering on it, and in this view of the matter has applied the principle of s. 15 of the Limitation Act.

I am not prepared to concur in that view. I think that the learned Chief Justice in the case of *Shib Singh v. Sita Ram* (1) has very satisfactorily and clearly dealt with the question that thus arises, and I unhesitatingly adopt his view in preference to that expressed by Sir Charles Turner in the case of *Shunmugam v.*

1892

THE COL-
LECTOR OF
ETÁWAH
v.
BETI MAHA-
RANI.

1892 *Moidin* (1). It is true that according to the terms of s. 486 of the Civil Procedure Code an attachment before judgment is to be made in the manner provided for the attachment of property for the execution of decree for money, but I am not prepared to say that the words used in s. 268, cl. (a), "the creditor from recovering the debt" mean that the creditor is prohibited from instituting the suit he is entitled to bring to assert his right to the debt. What I understand s. 268 to mean is that the debt is not to be realised by the judgment-debtor who is a creditor of some third party; and not that he is to refrain from, in the ordinary course of law, putting his claim into Court and asserting his right to such money as may be due to him. Neither under this order of attachment which, though not before us, I must presume to have been drawn up in the ordinary way, nor in the injunction which went first under the order of the lower appellate Court in the suit of Kirpa Dial, and next under my order in the appeal of Kirpa Dial to this Court, was there any prohibition to the party in whose hands the bond of the 20th June 1876 was, to restrain him from putting that bond in suit and obtaining a decree. If the decree had been obtained there would have been nothing to prevent the judgment-debtor under one of the clauses of s. 268 from paying the money into Court, while under the same section, cl. (a), there would have been a prohibition to refrain from realising the amount. I do not think that either in the order of attachment or in the injunction granted by the lower appellate Court or by this Court was there anything amounting to an injunction or order to restrain the obligee from maintaining an action upon the bond of the 20th June 1876, and I am unable to appreciate or understand any defence that the obligor could have set up on the facts, as I have stated them, which would have been a successful answer to the suit. This being the view which I take, it seems to me that there is in the way of the plaintiff succeeding an insuperable bar of limitation and that she must fail. Decreeing the appeal, I reverse the decree of the lower Court, and the suit of the plaintiff will stand dismissed with costs in all Courts.

TYRRELL, J.—I entirely agree with the order which my brother Straight has just made with regard to the disposal of this appeal and with his reasons for making that order; but I think it right to add that in one respect I am not altogether in accord with my learned brother, for I agree with the Court below in its finding that Ajudhia Prasad was not an agent duly authorized to acknowledge and sign an acknowledgment on behalf of Laik Singh in respect of his liability under the bond of the 20th June 1876. I think that the learned Subordinate Judge has given sufficient and sound reasons for coming to this conclusion. I agree that the appeal should be decreed and the suit of the respondent should be dismissed with costs here and below.

1892

THE COLLEC-
TOR OF
ETÁWAH
v
BETI MAHA-
RANI.

Appeal allowed.

PRIVY COUNCIL.

P.C.
1891
November 19.

LACHMI PRASAD (PLAINTIFF) v NARENDRO KISHORE SINGH
(DEFENDANT).

[On appeal from the High Court for the North-Western Provinces.]

Evidence—Failure to prove an alleged transaction of lending money.

Upon the evidence the decision of the High Court was affirmed as to a question of fact, viz., whether the defendant's deceased father had, or had not, in his lifetime, in consideration of a payment to his order by the plaintiff, promised repayment. The High Court, reversing the decree of the first Court, had found that there had been no sufficient proof of the alleged transaction. This was the conclusion, also, on this appeal; and although it was possible that the money might (as it was indicated in the judgment) have been wrongly obtained from the plaintiff by persons about him, it was not shown to have been received by the alleged borrower.

APPEAL from a decree (1st May 1888) of the High Court, reversing a decree (10th December 1886) of the Subordinate Judge of Benares.

The appellant, who carried on business in Benares as a banker obtained a decree in the Subordinate Judge's Court for Rs. 17,614 against the respondent, the Rája of Bettia, district Sarun, who succeeded his father, on the death of the latter, on the 27th

1891
 LACHMI
 PRASAD
 v.
 NARENDRA
 KISHORE
 SINGH.

December 1883. By his plaint the appellant claimed Rs. 12,000, with interest at 12 per cent. per annum, which he alleged that he had advanced to Musammat Sarab Mangla on the 28th November 1883, under an order of that date, signed by the late Rájá Rájendra Kishore, a month before his death.

Filed along with the plaint was an alleged parwana or order purporting to have been signed by Rájá Rájendra Kishore, in which he acknowledged the advance, at his request, of Rs. 12,000 to Musammat Sarab Mangla, and promised to repay this sum with interest at the above rate on or before the 16th November 1884. Also was filed what purported to be a receipt of the same date, signed by her, for that sum, stated to have been received through Sukhdeo Girdhar Das and Beni Misr.

The defence was that the parwana did not bear the signature of the late Rájá; that it was a forgery; and that no such advance was made on his authority. The issues were as to the genuineness of the alleged *parwana*, and the liability of the defendant to pay the amount.

The decree of the first Court having been reversed by the High Court (STRAIGHT and MAHMOOD, JJ.), on this appeal, Mr. J. Graham, Q.C., and Mr. H. Cowell, appeared for the appellant. They contended that the proofs were sufficient.

Mr. R. B. Finlay, Q.C., and Mr. R. V. Doyne, for the respondent, were not called upon.

Their Lordships' judgment was delivered by LORD MORRIS.

LORD MORRIS.—This is an action brought by a banker, or money-lender, against the heir of the deceased Mahárája Rájendra Kishore, for the recovery of a sum of Rs. 12,000, and interest, alleged to have been borrowed from him by the Mahárája shortly before his death. The transaction is said to have occurred on the 28th November 1883, and the Mahárája died on the 27th December following. In an action brought to recover money against an executor, or, as in this case the heir of a deceased person, it has always been considered necessary to establish as reasonably clear a case as the

facts will admit of, to guard against the danger of false claims being brought against a person who is dead and thus is not able to come forward and give an account for himself.

1891

LACHMI
PRASAD

v.

NARENDRO
KISHORE
SINGH.

The present case depends upon the testimony of two persons, Beni Misr and Sukhdeo, who detail a transaction which is in many respects of an improbable character, and would in any event require corroboration. Beni Misr is the Gomashta of the plaintiff. Sukhdeo appears to be a broker. He is described, in the judgment of the High Court, as a person who "hangs about the Bazár ready to "give his services in any way people may feel disposed to employ "him . . . a sort of tout, willing to mix himself up in any "sort of transaction, out of which he can obtain some remuneration "for his trouble." He says that he was one day accosted by a servant of the Mahárāja, named Dammal Pande, and requested to raise a loan for the Mahárāja. He describes the conversation between himself and Dammal Pande, and his going to Beni Misr. He relates the terms upon which Beni Misr agreed to the loan for the Mahárāja, namely, 1 per cent. per mensem, and how Beni Misr required that the Mahárāja should execute a document upon a *hundi* or stamped paper. He describes how he went back to Dammal Pande and informed him of the terms of the loan; how Dammal Pande went inside the house where the Mahárāja was, and came back saying that the Mahárāja agreed to the terms, and how he got a sum of Rs. 9 from Dammal Pande to purchase the *hundi* paper. He says specifically that he purchased the *hundi* paper "a "day before that on which the Mahárāja signed the *hundi*," namely, on the 27th November 1883. But the *hundi* paper has upon it the memorandum of the date of its sale, namely, the 28th November 1883, the day upon which the Mahárāja is alleged to have signed it. It is, therefore, in the absence of explanation, impossible that he could have bought it on the 27th, seeing that on the face of it it purports to have been issued on the 28th. The evidence of Sukhdeo, therefore, at the outset is met by this grave discrepancy, which is not a mere inaccuracy of date, but an inaccuracy which goes to the very root of the transaction which he purports to describe.

1891

JIJACHMI
PRASAD
v.
NARENDRO
KISHORE
SINGH.

The other witness, Beni Misr, deposes to the fact of his having accompanied Sukhdeo to the house of the Mahārāja. There is some want of distinctness as to whether he alleges that he saw the Mahārāja sign the parwana or not. He only states that the Mahārāja signed it; whereas Sukdeo says that he and Beni Misr went into the Mahārāja room, and that the Mahārāja signed it. Their Lordships would point to the difference between his having merely said that the thing was done, and his having said that he had seen it done.

The case of the plaintiff, therefore, who appears to have had no personal dealing whatsoever with the Mahārāja in this transaction, and who never saw him, depends altogether on the evidence of Beni Misr and Sukhdeo, and by their evidence he must stand or fall. There has been no corroboration of any kind of the story of these two witnesses brought forward on the part of the plaintiff. Indeed at the trial, and certainly in the argument of counsel on his behalf here, counsel seemed to think that the fact of two men having sworn to the signature of the Mahārāja to this instrument establishes the case so completely as to render it almost unnecessary to corroborate it on any particular. Their Lordships cannot concur in that view.

The transaction is open to a good deal of comment, both as regards its inception and the mode in which it was carried out. The Mahārāja had persons who were acting for him in the management of his affairs of considerable importance in his household, and it seems unlikely that Dammal Pande would have been employed at all by him in the matter. Then there is the significant fact of this large sum of money being raised by him just a month before his death, and with nobody of his household, apparently, brought into privy with it, or knowing anything about it. The discrepancy of date has been already mentioned. There is also a certain degree of difficulty attending the fact that the *parwana* purports to be drawn at twelve months' date, whereas no application for the money appears to have been made for some months afterwards, at all events, to Mr. Gibbon, the manager, to whom the plaintiff ultimately

wrote. He alleges in his first letter to Mr. Gibbon, of the 30th March 1885, that he had previously written for the money, but there is no distinct testimony of that. A reply was written to him by Mr. Gibbon, requiring to know for what necessary purpose in what manner, and through whom the money was advanced, and what evidence the plaintiff had in his possession that it was advanced, seeing that it did not appear from the inquiry and statements of the managers of the private expenses of the Mahārāja that it was drawn by him. To that letter the plaintiff does not appear to have given any direct answer. He alleged that he was ready to show the *parwana* but he passed by all the other demands made upon him to state the circumstances under which the money was advanced. Possibly, as stated by counsel for the plaintiff, parties in India, when a dispute on such a matter has arisen, may be chary of showing their hand, and, although they have an honest case, may wish to state as little as they can when they see that their claim is going to be resisted.

1891

LACHMI
PRASADv.
NARENDRO
KISHORE
SINGH.

The *parwana* purports to declare that a thing had been done which in reality was only going to be done; because it says, "As you have paid Rs. 12,000 to Musammat Sarab Mangla according to my permission, this money is due to you from me; and so I declare it in writing that I shall pay to you the principal amount, together with interest at 1 per cent per mensem, within a year, and take back this *parwana*"—whereas in any case the money had not been paid at that time. The explanation given is that the *parwana* was entrusted by the Mahārāja to one of his own servants to be deposited with Sarab Mangla, and that she was not to hand it over until she had actually got the money.

In addition to her handing over the *parwana* the plaintiff appears to have required from her a receipt for the money which has been relied upon by him as being a document of the last importance. It is in the following terms:—"I, Sarab Mangla, do declare that according to a *parwana* of the Mahārāja of Bettiah... ..with a direction for payment of money to me, I have received the sum of Rs. 12,000 in a lump sum from them through Sukhdeo,

1891

LACHMI
PRASAD

v.

NABENDRO
KISHORE
SINGH.

Girdhar Das and Beni Misr, and there is now nothing due. I have therefore granted this receipt in order that it may be of use when needed."

The document, as well as the *parwana* itself, is impeached as a forgery. As regards the *parwana* itself, there is the evidence in favour of it, as has been already observed, of Beni Misr and Sukhdeo. As against it there is the evidence of three witnesses on the question of handwriting, namely, Mr. Gibbon, an Englishman, who was the manager of the Mahārāja; Madho Narain, his paymaster; and Har Prasad, his office-keeper. These three witnesses all depose that the signature to the *parwana* is not in the handwriting of the Mahārāja. Sarab Mangla deposes that she never got the Rs. 12,000, and that the receipt referred to does not bear her signature.

If these documents were forgeries it does not follow that the plaintiff is involved in them. He may have given his money, and upon the evidence it would appear that he did give his money, to Beni Misr, to be handed over to the Mahārāja. He may have been misled by Beni Misr, and Beni Misr and Sukhdeo may have been in a conspiracy to obtain the money for themselves, and the money may have gone from the coffers of the plaintiff and still never have reached Sarab Mangla, whom the Mahārāja is said to have expressly ordered to receive it. It therefore does not appear to their Lordships that it is at all necessary to hold, nor that there is evidence in the case which would lead to the conclusion, that the plaintiff was in any way a party or privy to such a transaction.

It should never be forgotten that the onus of proof in this case lies upon the plaintiff. It is for him to satisfy their Lordships that he has established a reasonably clear case. But he has failed to bring forward the evidence which he ought to have done, when he knew that this transaction was called in question, and that the *parwana* and the receipt were impeached as forgeries. There are no less than five persons who ought to have been called in support of his case, but were not. The first person was the plaintiff himself, although, as their Lordships have already said, there is no evidence

establishing that he was party to this attempt to fix an untrue liability upon the heir of the Mahārāja. It would have been better, to say the least of it, if he had come forward and described the transaction so far, at all events, as he was able. But he did not come forward. The second witness, whose evidence would have been of the last importance, was Dammal Pande, for he appears, according to Sukhdeo's testimony, to have been the person who initiated the transaction by going to Sukhdeo and saying that he had been asked by the Mahārāja to obtain the Rs. 12,000. But Dammal Pande was not produced. The third missing witness was Bhagauti Parshad. He is said by Sukhdeo to have written the receipt, to have taken it to Sarab Mangla for her signature, to have obtained her signature to it, and to have given it with the *parwana* to Beni Misr. His evidence would have been most material. But he was not called. The absence of Girdhar Das is still more extraordinary. He is named in the receipt as being one of the three persons who paid over the money to Sarab Mangla, the other two being Beni Misr and Sukhdeo. Yet he was not called. Neither has there been any attempt to identify the Muharrir, to whom no name has been given, who was alleged to have written the *parwana* itself. It was suggested that he was the same person as Bhagauti Parshad who wrote the receipt. But no evidence has been given that this was so.

Thus, all the probabilities of the case are against the plaintiff. The evidence of the handwriting is distinctly against him, and he has in no way corroborated, as he might have done, the testimony of Beni Misr and Sukhdeo. Neither has any trace been found in the books of the Mahārāja of any loan of this sort. To this counsel for the plaintiff replied that, it being a loan to this lady, who was his mistress, it was not a transaction that would be likely to appear in the Mahārāja's books. But the fact nevertheless remains that no trace of it can be found there.

It appears to their Lordships that the decision arrived at by the High Court on appeal from the Subordinate Judge of Benares, is right, and they will humbly advise Her Majesty to affirm the decree

1891

LACHMI
PRASADv.
NARENDRO
KISHORE
SINGH.

1891

LACHMI
PRASAD

v.

NARENDRO
KISHORE
SINGH.

of the High Court and dismiss this appeal. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant:—Messrs. Ranken Ford, Ford, and Chester.

Solicitors for the respondent:—Messrs. T. L. Wilson and Co.

APPELLATE CIVIL.

1892

January 28.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Tyrrell.

GAYA PRASAD (DEFENDANT) v. BAIJ NATH AND ANOTHER
(PLAINTIFFS).*

Lease—Assignment by the Official Liquidator of lease held by a Company in liquidation—Assignment not in writing registered—Suit for rent—Use and occupation.

In the course of the winding up of a Company, the Official Liquidator, with the sanction of the Court, sold the remainder of a lease for a long term of years reserving a rent, which was held by the Company. No written assignments was over executed, but the Official Liquidator handed over the lease to the purchaser, who entered into possession. In a suit by the lessors against the purchaser for rent.

Held that whether the assignment was invalid because not in writing and registered, or whether it fell within s. 2 (d) of the Transfer of Property Act (IV of 1882), the defendant, even if not liable as assignee in law of the lease, was liable for rent as for the use and occupation, and under such circumstances the rent fixed by the lease would be a fair basis for the amount to be decreed.

THE facts of this case sufficiently appear from the judgment of the Court.

The Hon. G. T. Spankie, Mr. Mehdi Hasan and Babu Rajendro Nath Mukharji, for the appellant.

*Second Appeal No. 671 of 1890, from a decree of G. J. Nicholls, Esq., District Judge of Cawnpore, dated the 20th March 1890, confirming a decree of Maulvi Akbar Husain, Subordinate Judge of Cawnpore, dated 4th February 1890.

Mr. T. Conlan and Munshi Ram Prasad, for the respondents.

1892

EDGE, C. J., and TYRRELL, J.—This was a suit for rent. The plaintiffs' suit was decreed by the first Court, and the defendant's appeal was dismissed by the lower appellate Court. The facts of this case are as follows:—

GAYA
PRASAD
v.
BAIJ NATH.

On the 1st December 1883, the plaintiffs granted a lease of the land and the buildings thereon in the city of Cawnpore to the Cawnpore Cotton Ginning Company for a long term of years, reserving a rent. The deed contained several covenants to be performed by the lessors, their successors and assignees.

The Company got into difficulties and was wound up under the Indian Companies Act, 1883. In the process of winding up, the Official Liquidator, with the sanction of the Court, sold the property of the Company in the land in question, that is, their interest in the lease by auction. The defendant was the purchaser. There was no written assignment ever executed, although the sale took place as far back as the 11th October 1886. The Official Liquidator handed over the lease to the defendant and the defendant entered into possession of the land included in the lease and the buildings and the property thereon. If the defendant is liable as assignee of the lease, the plaintiffs are entitled to the decree for rent and interest which they have obtained. If, on the other hand, by reason of there having been no assignment in writing registered of the lease he is not in law, according to the Transfer of Property Act, the assignee of the lease, it does not follow in our opinion that he is not liable for the amount which has been decreed. It has been contended on behalf of the plaintiffs that the sale having been effected under an order of a competent Court sanctioning the act of the Official Liquidator s. 2 (d) of the Transfer of Property Act, 1882, applies, and excluding the transaction from the requirements of that Act, the defendant is in law the assignee of the lease. It is undoubted that everything was done to make him assignee of the lease unless the case comes within the Transfer of Property Act. It is by no means easy to say whether or not the sale in the present case was within the meaning of s. 2 (d) of

1892
GAYA
PRASAD
v
BAIJ NATH.

that Act, a transfer by or in execution of an order of a Court of competent jurisdiction. Certainly without the order sanctioning the sale the defendant would have got no title from the Official Liquidator. In one sense it might be considered that the transfer in question was in execution of the order which was made. However that may be, we do not think it necessary actually to decide whether s. 2 (d) of the Transfer of Property Act, 1882, applies. Assuming for the moment that the sale in this case was not a transfer within the meaning of s. 2 (d), and that consequently there has been no good assignment under the Transfer of Property Act, 1882, of the lease with its benefits and liabilities to the defendant, we are of opinion that he still is liable for the amount claimed. He purchased the interest of the Company at the sale, he got, and holds, possession of the lease, and he took, and since the date of the sale has held, possession of the land and buildings thereon. He cannot be treated as a trespasser. Although in one sense his title may be infirm, he was let into possession by the Official Liquidator acting under the sanction of the Court. In the latter view, we consider that for the time in respect of which the suit is brought the defendant, even if not liable as assignee in law of the lease, is liable for rent as for the use and occupation, and under such circumstances the rent fixed by the lease would be a fair basis for the amount to be decreed. The result is that in whichever aspect the defendant's possession is regarded, and, whichever may be the true view of that position, the defendant in our opinion is liable for the amount decreed. That decree we shall not disturb. We ought to say in conclusion that Official Liquidators who take leases and subsequently as such Liquidators sell the interest of the lessee had better, for their own protection and to avoid any question as to their continuing liability, execute in favour of the purchasers written assignments of the leases and see that they are registered. We dismiss the appeal with costs.

Appeal dismissed.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice, Straight, Mr. Justice Tyrrell, Mr. Justice Mahmood, and Mr. Justice Know.

1892
March 10.

PEM SINGH AND OTHERS (DEFENDANTS) v. PARTAB SINGH
(PLAINTIFF).

Hindu Law—Joint Hindu family—Hypothecation by father of joint ancestral estate—Property described as “haq haquq zamindari apna” —Decree enforcing hypothecation—Attachment of estate Suit by sons for declaration that only father's interest affected by hypothecation—Burden of proof.

Where a Hindu son comes into Court to assail either a mortgage made by his father, or a decree passed against his father, or a sale held or threatened in execution of such decree—whether it be upon a mortgage security or in respect of a simple money debt—where there is nothing to show any limitation of the interest sold or threatened with sale or charged in a security or dealt with by a decree, it rests upon him, if he seeks to escape from having his interest affected by the sale, establish that the debt which he desires to be exempted from paying was of such a nature that he as the son of a Hindu would not be under a pious obligation to discharge it, or that his interests in the property were not covered by the mortgage or touched by the decree or affected by the sale certificate. *Beni Madho v. Basdeo Patak* (1) and *Bhawani Bakhsh v. Ram Das* (2) approved.

In a suit by the sons of a Hindu for a declaration that certain joint ancestral property was not liable to sale in execution of a decree upon a hypothecation bond of such property executed by their father in which the property was described as “haq haquq zamindari apna,” and that the bond and decree were limited to the father's own interest,—held by the Full Bench that, if the plaintiffs could not show that the interest which was hypothecated was a limited interest, the Court must take it, as against the plaintiffs that the family property was hypothecated.

THIS was a suit for a declaration that certain immovable property should be released from attachment and exempted from sale in execution of a decree obtained by five of the defendants against the first defendant, who was the father of the plaintiffs (the family being a joint Hindu family), on the allegations that the property was the joint ancestral estate of the judgment-debtor and the plaintiffs; that the decree was passed upon a hypothecation bond which did not charge the whole joint ancestral estate, but only the mortgagor's interest therein, and that only the judgment-debtor's one-third share was liable to attachment and sale in execution of the decree.

1862
 FEM SINGH
 v
 PARTAB
 SINGH.

The property in suit consisted of zamindari shares in four villages, Rampura Enayetpur, Rupura, Nahna, and Nagain Datnagar. It was hypothecated by the first defendant Baldeo Singh in favour of the ancestors of the defendants 2 to 6 by a bond dated the 24th December 1875. The bond was as follows:—

“I hypothecate my rights and interests in the zamindari (*haq haquq zamindari apna*) in the villages of Rupura, Rampura Enayetpura, Nahna, Dehat pargana tahsil Karaur, and also Nikasdatnagar, tahsil Aonla, (*haq haquq zamindari Aonla*) Bareilly, in satisfaction of the creditors for the recovery of the said amount. I hereby promise that till the payment of the entire amount I shall not alienate, sell, mortgage or make a gift of the property hypothecated in the bond, if I do so it shall be null and void.”

Upon this bond the obligees brought a suit against Baldeo Singh, and on the 22nd February 1886, they obtained a decree for enforcement of hypothecation, and in this execution of this decree the property mentioned in the bond was attached. Hence this suit. The defendants pleaded that inasmuch as the debt contracted by Baldeo Singh and secured by the bond was not of an immoral character, but was incurred for family purposes, the plaintiffs were bound by it, and that the hypothecation and the decree thereon were sufficiently wide to cover not merely Baldeo Singh's interest but that of the whole family in the ancestral estate.

The Court of first instance (Munsif of Bareilly) and the lower appellate Court (Subordinate Judge of Bareilly) decreed the suit, holding on the construction of the bond of the 24th December 1875, that the hypothecation was limited to the interest in the ancestral estate of the mortgagor Baldeo Singh. The defendants appealed to the High Court.

Munshi Ram Prasad, for the appellants.

Babu Bishan Chandra Moitra, for the respondent.

EDGE, C.J.—The plaintiff in this suit sought a decree declaring that the property in suit should be exempted from sale in execution under a decree obtained by the defendants two to six against

the defendant No. 1, who was the plaintiff's father. The seventh defendant is a brother of the plaintiff and a *pro forma* defendant. The decree was obtained on a hypothecation bond executed by the defendant No. 1, Baldeo Singh, the father of the plaintiff.

1892
 PEM SINGH
 v.
 PARTAB
 SINGH.

The first Court on the construction of the bond held that Baldeo Singh had hypothecated his own particular share only in the family property. The second Court in appeal construed the bond as the first Court had done. The defendants two to six have brought this appeal. The defendant Baldeo Singh had described the property which he was hypothecating, so far as this appeal is concerned, in the following words—"main ne haq haquq zumindar apna, &c.," giving the names of the villages and the pargana in which the property was situated. It appears to me that that description was capable of covering the whole property referred to in the deed in which Baldeo Singh had an undivided interest, that is, the whole of that family property. It is possible that the intention of the parties was that his own particular interest as distinguished from the interest of the joint family only was intended to be hypothecated.

Now, taking the view which I do of the wording of the deed, I think the law to be applied is to be found concisely stated in the judgment of my brother Straight, which was concurred in by my brother Mahmood, in the case of *Beni Madho v. Basdeo Patak* (1). It is to be found in the following portion of the judgment at the foot of page 104:—"These rulings seem to me to have gone somewhat further than the former ones, and the outcome of the whole of this body of decisions appears to be this, that where a Hindu son is coming into Court to assail either a mortgage made by his father or a decree passed against his father or a sale held or threatened in execution of such decree—whether it be upon a mortgage security or in respect of a simple money debt—where there is nothing to show any limitation of the extent of interest sold or threatened with sale or charged in a security or dealt with by a decree, it rests upon him, if he seeks to escape from having his

1892
 PEM SINGH
 v.
 PARTAB
 SINGH.

interests affected by the sale, to establish that the debt he desires to be exempted from paying was of such a character that he, as the son of a Hindu, would not be under a pious obligation to discharge it, or that his interests in the property were not covered by the mortgage or touched by the decree or affected by the sale certificate." That proposition was approved of by our brother Straight and our brother Tyrrell in *Bhawani Bakhsh v. Ram Das* (1). The judgments in those two cases referred to all the material cases which I am aware of relating to the point in question. Taking this view of the case I think we should set aside the decree of the lower appellate Court and remand this case under s. 562 of the Code of Civil Procedure for trial upon the merits.

Now one point which it appears to me the lower appellate Court will have to try, if there is material on the record for the purpose or if the evidence is tendered, is what was the real intention of the parties to the hypothecation bond? If the plaintiff is not in a position to show that the interest which was hypothecated under the hypothecation bond was a limited interest, then the Court below must take it as against the plaintiff, that the family property was hypothecated. There may be several other issues to be tried in this case which must be tried when the case is tried on the merits. I would accordingly remand this case under s. 562 and order that the costs here and hitherto should abide the result.

STRAIGHT, J.—I only wish to add a word to what has fallen from the learned Chief Justice, in whose remand order I entirely concur. The learned Subordinate Judge has in the course of his judgment referred to ruling of my brother Mahmood and myself in *Raghubar Singh v. Lachmi Narain* (2). If the learned Subordinate Judge had examined that judgment more closely, he would have seen that, in advertence to a ruling of their Lordships of the Privy Council in *Simbhunath Pande v. Golap Singh* (3), I was of opinion that the terms of the sale certificate, which was the document of title of the auction-purchaser in that

(1) I. L. R., 13 All., 216. (2) Weekly Notes, 1887, p. 291.

(3) I. L. R., 14 Calc., 572.

case, passed no more than the rights and interests of the father, and applying the rule laid down in the Privy Council ruling to which I referred, I held that only the father's interest passed. The present case is a very different one, as pointed out by the learned Chief Justice.

1892
 PEM SINGH
 v.
 PARTAB
 SINGH.

TYRRELL, J.—I quite agree with the views expressed and the order passed by the learned Chief Justice, and I think that his opinion is fortified by the consideration that whereas the mortgagor in respect of part of the mortgaged property situate in manzas Raupur and Rampura used the words "*haq haquq zamindari apna*," he described another portion of the property hypothecated situated in another pargana as "*haq haquq zamindari Aorla*" without the qualifying word "*apna*." Now there is no suggestion that any difference exists or was intended to exist as to the extent of the rights and interest hypothecated in the two properties respectively. The bond should be read according to the ordinary rules of interpretation in such a way as to make the description, so far as the word "*apna*" is concerned consistent with the description of similar property in the same document where it is not used. I concur in the order proposed.

MAHMOOD, J.—The rule of law which I would apply to this case is exactly the principle upon which my brother Straight proceeded with my concurrence in the case of *Beni Madho v. Basdeo Patak* (1) and where all the principal rulings of their Lordships of the Privy Council upon this somewhat complicated question were reviewed and considered and a decision arrived at in which I delivered no judgment other than saying that I was entirely of the same opinion. The other case is *Bhawani Bakhsh v. Ram Dai* (2) in which my brothers Straight and Tyrrell, whilst discussing a cognate case, expressed views which are wholly consistent with the case to which I have referred before.

Here the difficulty arises, not over my having any doubt as to the soundness of those rulings, nor any difficulty over a question of law, but a difficulty over a question of interpreting a document.

(1) I. L. R., 12 All., 216.

(2) I. L. R., 13 All., 216.

1892
PEM SINGH
v.
PARTAB
SINGH

Fortunately this document happens to be in a language which is my own, and I may, therefore, say with some confidence that the interpretation placed upon this document of the 24th December 1875 by the learned Chief Justice is exactly as I understand the document: and I am using the language for which I am indebted to my brother Tyrrell when I say that even if we allow the fullest import to the single word "*zamindari*" in respect of some only of the villages, I would understand the word to cover the whole property of the mortgagor, who would, and doubtless did, hold himself to be the owner of all the *zamindari* of himself and his infant children.

This interpretation is exactly what I understand the language of this deed to mean, because these words, "*haq haquq zamindari apna*," do not by dint of the use of the word "*apna*" exclude other rights such as would in ordinary Urdu idiom exclude those rights. A Hindu father holding property belonging to his children does describe his *zamindari* to be his own. He does not call it the *zamindari* of himself, his children, wife or wives. The word "*apna*" has no significance other than saying "my *zamindari* right." It certainly cannot mean the exclusion of such other rights as the father may hold under the system of joint Hindu family property.

An attempt was made to show by dint of a ruling of a Calcutta Division Bench in *Uporoo Tewary v. Lalla Bandhjee Suhay* (1) that the use of a word like this would mean that there was exclusion of the shares of other members of the joint family when the father of the family, let me call him *paterfamilias*, deals with the whole property of that family. On account of this discussion it was by our order that the original deed of the 24th August 1864, which was the subject of consideration by the learned Judges of the Calcutta Division Bench in the case to which I have referred, has been sent for, and it is now before me. It is a document in Persian, and I think I should be taking up more time than necessary if I had to show that the word "*apna*," which is the Urdu

word as it occurs in this deed, is not to be understood in the sense in which that document used the word "*khud*," nor how far that document was fully apprehended by the Calcutta Court.

All I think is this. This is a deed which conveyed all that the executant thereof intended to convey: that he as head of the family intended that all that he called his own should be conveyed, and his position is not that of an ordinary *karta*. In the cases to which my brother Straight referred, in the two judgments to which I have alluded, and in other cases also, the Privy Council has distinguished the position of a father as the managing member of the family from that of an ordinary managing member. Therefore in this case the executant being the father, his position must not be confounded with that of any other manager of a joint Hindu family. This being so, the two rulings to which I have referred leave no doubt in my mind that unless it can be proved that the mortgage for which the bond of the 24th December 1875, whereupon the decree of the 23rd February 1886 was passed, was due to immorality of the executant, namely, the father of the present plaintiff, I should be inclined to hold that there is no case made out why that bond should be set aside or why it should be held that only the share of the executant and not of his children passed by that deed. I may also add that the decree itself is not well prepared, because it refers to the bond itself, and I have, therefore, considered it necessary to consider the terms of the bond.

For these reasons I agree in the order which has been proposed by the learned Chief Justice.

KNOX, J.—For the reasons given by the learned Chief Justice I concur in the proposed order of remand:

Cause remanded.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Mahmood, and Mr. Justice Knox.

UDIT SINGH AND OTHERS (DEFENDANTS) *v.* KASHI RAM (PLAINTIFF).
Easement—Way—Prescription—Landholder and tenant—Act V of 1882
(Easements Act)—Act VIII of 1891.

1892
March 11.

There is nothing in Act VIII of 1891 to compel the Court to apply the Easements Act (V of 1882) to a suit commenced before Act VIII of 1891 came into force.

1892

UDIT SINGH

v.

KASHI RAM.

A tenant cannot as against his landlord acquire by prescription an easement of way in favour of the land occupied by him as tenant, over other land belonging to his landlord.

So held by the Full Bench. *Gayford v. Moffatt* (1) referred to.

THE plaintiff in this case was a corn-dealer who established a market upon a plot of land which he rented from the defendants. To the north of this plot was a piece of waste land belonging to the defendants, and access to the market could only be obtained through this land. Such access was afforded by a wide opening between certain buildings on the west and east. In January 1886 the defendants built on their own land a wall across the opening, cutting off all communication from the north to the plaintiff's market. On the 16th March 1886 the plaintiff instituted the present suit, in which he claimed the demolition of the wall, a declaration that he was entitled to an easement of way by prescription through the defendants' waste land to the market, and damages for the loss of business at the market caused by the erection of the wall and obstruction of the passage.

The Court of first instance (Munsif of Balia) decreed the claim. On appeal by the defendants, the District Judge of Ghazipur affirmed the Munsif's decree. The defendants preferred a second appeal to the High Court.

The appeal came for hearing before Mahmood, J., who directed that the case should be laid before the Chief Justice, with a recommendation that three questions (which are stated in the judgment of Edge, C.J., below) should be referred to the Full Bench. These questions were accordingly ordered by Edge, C.J., to be referred to a Full Bench of five Judges.

Mr. *Roshan Lal*, for the appellants.

Munshi *Kashi Prasad*, for the respondent.

EDGE, C.J.—This is a second appeal in a suit brought by tenant against his landlords, in which the tenant alleged that he had acquired by user an easement or right of way over the adjoining

land of his landlords. The questions which we are asked to decide in order to dispose of this suit are as follows :—

1892

UDIT SINGH

v.

KASHI RAM.

“(1) Whether Act VIII of 1891 is retrospective, that is, whether, by dint of the enactment, Act V of 1882 governs this case.

“(2) Whether a tenant or occupier of land can acquire for his own benefit a right of easement under s. 26 of the Indian Limitation Act (XV of 1877) or under the Indian Easements Act (V of 1882) read with Act VIII of 1891.

“(3) If so, whether the tenant can acquire an easement against his own landlord.”

The alleged cause of action was the building by the landlords of a wall which interfered with the right of way claimed. So as to avoid any mistake as to my meaning, I should point out that the tenant does not allege that his holding had at the time it was let to him the right of way in question as appurtenant to it, nor does he allege that the landlords granted any such right of way as appurtenant to the holding, nor again does he allege that the way claimed was what is known in law as a way of necessity; he merely alleges that he as the tenant in the occupation of his holding had by user obtained a right of way against his landlords, over their adjoining land. In my opinion it is contrary to common sense that any such right as is here alleged could possibly have been acquired. Such right could only have been acquired, if at all, in respect of the holding occupied by the plaintiff. That holding is the landlords' holding, and they, the landlords, are in possession of it through their tenant the plaintiff. The plaintiff is not an owner claiming a right in respect of a dominant tenement over another, servient, tenement; he is not claiming his right for or on behalf of his landlords; but he is claiming it adversely to them, although for and on behalf of their own property. The law, as I conceive it to be, was very concisely put and illustrated by Lord Cairns in his judgment in *Gayford v. Moffatt* (1). That was a case in which a tenant was claiming a right of easement over his landlord's

(1) L. R., 4 Ch. A., 133.

1882
ULIT SINGH
v.
KASHI RAM

property as a right acquired by the tenants not granted by the landlord. Lord Cairns said—"But it is not necessary to examine the user, for this reason, that if there is a person to whom the owner of two closes has demised one of them, and if in order to get at that one there is a necessity to cross the other close which was not demised, and if, in the course of years, from the circumstance that the landlord had no particular occasion to use the close for any other purposes, or that he was not strict in obliging his tenant to adhere strictly to the way, he had allowed the tenant for his convenience occasionally to make deposits of this kind on other parts of the close, still it is utterly impossible that by such a course of proceeding the tenant as against his landlord could acquire any easement whatever. An easement must be acquired in respect of some tenement, and the only tenement in respect of which this easement could be acquired, and which itself would become the dominant tenement, is the demised close. But the possession of the tenant of the demised close is the possession of his landlord, and it seems to be an utter violation of the first principles of the relation of landlord and tenant to suppose that the tenant, whose occupation of close A was the occupation of his landlord, could by that occupation acquire an easement over close B, also belonging to his landlord, the duty of the tenant being to take care that if he is passing over close B at all, he should do nothing on it more than his lease authorized him to do, and it must be supposed for this part of the argument that the lease in this case authorized him to do no more than cross the yard without any right of depositing goods on it." In that case it must be observed that it was assumed that the lease granted a right of way, but not the right claimed by the tenant to deposit goods on the neighbouring close of his landlord. I would answer the first question by saying that Act V of 1882 does not govern this case, inasmuch as it was not made applicable to these Provinces until after this suit commenced, and there is nothing in Act VIII of 1891 to compel us to apply Act V of 1882 to a suit commenced before Act VIII of 1891 came into force. I would answer the second and third questions so far as they are applicable to the facts

of this case in the negative, and further with regard to the Indian Easements Act (Act No. V of 1882) I would draw attention to s. 12 of that Act. The result is that I would allow the appeal and dismiss the suit with costs in all Courts.

1892

UDIT SINGH
v.
KASHI RAM.

STRAIGHT, J.—I entirely agree with the learned Chief Justice both in his answer to the questions referred and in the decree which he proposes to make in the appeal.

TYRELL, J.—I am entirely of the same opinion as the learned Chief Justice.

MAHMOOD, J.—I also am of the same opinion ; but there is one point which I wish to explain, and that is that the passing of Act VIII of 1891, which extended the operation of the Indian Easements Act (V of 1882) to these Provinces, cannot, in the absence of express words, be taken as retrospective, or as either disturbing existing rights or creating new ones. Therefore till the date of the coming into force of Act VIII of 1891, there was no law in this part of the country governing questions of easements except s. 26 of the Indian Limitation Act (XV of 1877) and such portions of the Common Law as were applicable to those questions. Another point which I wish to add relates to the emphasis laid by Mr. *Jwala Prasad* in regard to the use of the words “owner or occupier of certain land” as those words occur in s. 4 of the Indian Easements Act in the definition of the word “easement,” and also I wish to refer to s. 12 of that enactment in order to say that neither the definition contained in the former section nor anything in the latter section militates against the view which the learned Chief Justice has expressed. The Indian Easements Act may be referred to and taken for what it is worth in settling disputes arising before the Act was extended to these Provinces, but it does not in any way negative the views expressed by the Chief Justice and concurred in by brother Straight. Then come the other two questions of my referring order, and as to these I have merely to add that I agree not only in the judgment of the learned Chief Justice but also in the decree proposed by him.

1892 KNOX, J.—I am of the same opinion as the learned Chief
 Udit Singh Justice both as to the answer to the reference and as to the decree
 v. which he proposes to pass in the appeal.
 KAHSI RAM. [The appeal was accordingly allowed and the suit dismissed
 with costs.]

APPELLATE CIVIL.

1892
 March 24.

Before Sir John Edge, Kt., Chief Justice and Mr Justice Tyrrell.

MUHAMMAD HUSAIN (DEFENDANT) v. DIP CHAND AND OTHERS
 (PLAINTIFFS).*

*Hindu Law—Joint Hindu family—Simple money decree against father how
 far binding upon son's interest in the joint family property—Execu-
 tion of decree—Civil Procedure Code, section 237.*

With reference to the question whether the whole joint family property or only the interest of the father therein is liable under a decree obtained against a Hindu father, *held* that where there is nothing to show any limitation of the extent of the interest sold, whether the sale took place in execution of a decree on a mortgage or of a simple money decree, it may be presumed that the family property and not the mere undivided share of the father was sold. *Pem Singh v. Partab Singh* (1) referred to.

The specification required by section 237 of the Civil Procedure Code, of the judgment-debtor's share or interest in immoveable property sought to be attached, should state distinctly whether it was the judgment-debtor's undivided share or the family property in which the judgment-debtor had an undivided share, which was sought to be attached, and should also specify what that family property was. If the specification merely referred to the judgment-debtor's share and interest in what was the family property, the Court would hold, unless something to the contrary appeared, that the sale was of that share and interest only.

The facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellants.

Mr. *A. H. S. Reid* and *Munshi Ram Prasad*, for the respondent.

* Second appeal No. 1800 of 1885 from a decree of W. R. Barry, Esq., District Judge of Aligarh, dated the 15th June 1885, reversing a decree of Maulvi Sami-ullah Khan, Subordinate Judge of Aligarh, dated the 30th June 1883.

(1) *I. Ante*, p. 179.

EDGE, C.J., and TYRRELL, J.—The appellants in this second appeal are auction-purchasers or representatives of auction-purchasers who purchased at an auction sale in 1861 held in execution of a money decree obtained against one Duli. The suit out of which this appeal has arisen was brought by one Dip Chand, a grandson of Duli, against these appellants, or those since dead whom they now represent. We shall refer to the appellants as the defendants in this suit for brevity's sake. Dip Chand was born before that sale of 1861, and was at the time of that sale a minor. Since this appeal was filed Dip Chand died and his father, Sita Ram, was brought on the record to represent the interest of Dip Chand in the appeal. The suit was to obtain possession of Dip Chand's share, namely, one-sixth, in the property which the auction-purchaser took possession of after the sale to them by auction in 1861. The question has been, what was the property sold, that is, was the property sold the whole of the undivided family property in the mauza, or was it merely Duli's undivided share in the family property, in other words, his right to partition? The lower appellate Court found that Dip Chand's share was not sold. The meaning of that finding is that the only share which was sold in execution of that money decree in 1861 was the undivided share of Duli in the family property. It has been contended by Pandit *Sundar Lal* that on the authority of *Beni Madho v. Basdeo Patak*(1) and the recent Full Bench ruling in *Pem Singh v. Partab Singh*(2) the lower appellate Court should have found as a question of law that the whole family property, and not Duli's undivided share, was sold at the auction sale in 1861. On the other hand, Mr. *Reid* for the respondent has referred to *Hardi Nurain Sahu v. Ruder Perakash Misser* (2) and *Maruti Sukha Ram v. Babaji*(3), and has contended that the decree in execution of which the auction sale took place having been a money decree against Duli and not against the members of the joint Hindu family, the lower appellate Court's finding is correct in law. He has pointed out that in each of the cases cited by Pandit *Sundar Lal* the sale had either been effected or threatened

1892

MUHAMMAD
HUSAIN
v.
DIP CHAND.

(1) I. L. R., 12 All., 99. (2) *Ante*, p. 179.

(3) I. L. R., 15 Bom., 87.

1892 in execution of a decree obtained on a mortgage. We abide by
MUHAMMAD the view expressed in effect in the recent Full Bench ruling that
HUSAIN where there is nothing to show any limitation of the extent of the
v.
DIP CHAND. interest sold, whether the sale took place in execution on of a decree
on a mortgage or in execution of a simple money decree obtained
against the father, a member of a joint Hindu family, it may be pre-
sumed that the family property and not the mere undivided share
of the father was sold. Such a case can rarely arise where the de-
cree is a money decree simply, because the creditor seeking execu-
tion of his money decree is bound under section 237 of the Code of
Civil Procedure to set forth in his application for attachment of the
property a specification of his judgment-debtor's share or interest
in the property sought to be attached. Section 238 of the Code
would also bear on such a case where the property was registered
in the Collector's office. In our opinion such specification should
state distinctly whether it was the judgment-debtor's undivided
share or the family property in which the judgment-debtor had an
undivided share which was sought to be attached and should
also specify what that family property was. If the specification
merely referred to the judgment-debtor's share and interest in what
was the family property, we should be prepared to hold, unless some
thing to the contrary appeared, that the sale was of that share
and interest only and nothing else. At the time of the execution
proceedings in which the sale of 1861 took place Act No. VIII of
1859 was in force, and by section 213 of that Act an application
for attachment of immoveable property required a specification simi-
lar to that required under section 237 of Act No. XIV of 1882.
Neither party apparently put in evidence the execution proceedings
of 1861. There was however some other evidence on the record, on
which the lower appellate Court found that the decree in execution
of which the sale of 1861 took place was a decree against Duli and
others who were strangers to the joint family and in respect of a
matter in which the joint family was not interested and in which
Duli had not represented the joint family. There is some evidence
on the record that Duli was made liable in that matter not as
a principal, but merely as a surety. It appears to us that there is

evidence, slight though it may be, to support the finding of the lower appellate Court that Dip Chand's one-sixth was not sold in 1861. Pandit *Sundar Lal* raised a further contention, namely, that this suit was barred by section 13 of the Code of Civil Procedure. It appears that Sita Ram and his brother Nathu brought a suit against the purchasers of 1861 to recover the whole of the property which they had taken possession of after the sale, their case being that Duli's liability arose out of an immoral contract from a Hindu point of view. That suit was dismissed. It appears to us that that dismissal does not operate as *res judicata* in this suit. In that suit Sita Ram and Nathu appear to have been suing on their own behalf. It does not appear that either of those plaintiffs represented Dip Chand, although Sita Ram was in fact Dip Chand's father. The accident that Sita Ram for the purpose of defending this appeal has been brought upon the record as the legal representative of Dip Chand has, so far as we can see, no bearing on this question. It was Dip Chand who obtained the decree from the lower appellate Court and Sita Ram is merely here to defend that decree, supporting the decree and the rights of the person whom he represents. There is a slight error, we are informed, in the decree below. The decree will stand for delivery of possession of one-sixth of the property of which the auction-purchasers who are now before us, or represented, got possession under the auction of 1861 and for proportionate mesne profits calculated on the basis of the profits ascertained below. To that extent the decree below will, if necessary, be varied, in other respects the appeal will be dismissed with costs.

1892
 MUHAMMAD
 HUSAIN
 v.
 DIP CHAND.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

JAFAR HUSAIN AND ANOTHER (DEFENDANTS) v. MASHUK ALI
 (PLAINTIFF).*

1892
 April 2.

Suit for recovery of possession of immoveable property—Limitation—Adverse possession—Burden of proof—Act XV of 1877 (Limitation Act), s. 28.

Where a suit for the recovery of possession of immoveable property is resisted by a plea of adverse possession for more than twelve years, the

* First Appeal No. 40 of 1891 from an order of Balu Mritonjoy Mukerjee, Sub-ordinate Judge of Benares, dated the 28th March 1889.

1892

JAFAR
HUSAIN
v.
MASHUK
ALI.

question of limitation becomes a question of title, and it lies upon the plaintiff in the first instance to give satisfactory *prima facie* evidence of his possession within twelve years of the suit. *Mohima Chunder Mozoomdar v. Mohesh Chunder Neoghi* (1) and *Parmanand Misr v. Sahib Ali* (2) referred to.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Munshi *Jwala Prasad* and Munshi *Kashi Prasad*, for the appellants.

Mr. *Abdul Majid*, for the respondent.

EDGE, C.J., and BLAIR J.—This was a suit for possession brought by a husband of a deceased Muhammadan lady against her brother and her brother's son. The plaintiff alleged that he was dispossessed in 1887. The defendants alleged that the plaintiff and the lady through whom he claims had never been in possession, and that the defendants had held adverse possession for more than twelve years. The first Court dismissed the suit as barred by limitation. The District Judge on appeal set aside this decree of the first Court, and finding that twelve years' adverse possession was not established, made an order of remand under s. 562 of the Code of Civil Procedure. From that order of remand the appeal has been brought. The District Judge did not try the issue as to whether the plaintiff had been in possession within twelve years before suit; he assumed that in a case of this kind the onus of proof was upon the defendant, and he in fact found no facts on which we could infer that he thought the plaintiff had made out a *prima facie* case of possession within twelve years.

We are satisfied that where a plaintiff comes into Court alleging that he has been dispossessed within limitation, and when the defence is adverse possession, the question of limitation becomes a question of title. The plaintiff must at least give some *prima facie* evidence to satisfy the Court in the first instance that he was in possession within twelve years before the defendant can be called upon to make out his defence of twelve years' adverse possession. Apparently that is the result of the decision of their Lordships of the Privy Council

in the case of *Mohina Chunder Mozosmdar v. Mohesh Chunder Neoghi* (1). The authorities which show that s. 28 of the Indian Limitation Act of 1877 makes limitation a matter of title to be proved by the plaintiff in suits for the possession of property are collected in the case of *Parmanand Misr v. Sahib Ali* (2). In the present case the District Judge had not tried, or apparently considered, the question as to whether plaintiff had proved, *prima facie* or otherwise, title within twelve years before suit. On that point he seems to have expressed no opinion on the plaintiff's evidence at all. Before going into the question as to whether the defendants had or had not a title by adverse possession, the District Judge ought to have satisfied himself and expressed an opinion that there was *prima facie* proof that the plaintiff had a subsisting title at the commencement of the suit. We set aside the order of remand and remand the case under s. 562 of the Code of Civil Procedure to the Court of the District Judge for him to try the issues which arise in the case and to dispose of the appeal according to law. It may be that the District Judge may find the question of limitation either way. We express no opinion on the facts on either side as to the question of limitation. Costs here and hitherto will abide the result.

1893

JAFAR
HUSAIN
v.
MASHUQ
ALI.

Cause remanded.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

ALI AHMAD (PLAINTIFF) v. RAHMAT-ULLAH
(DEFENDANT).*

1892

March 10.

Construction of document—Mortgage—Sale—Bai-bil-wafa, nature of—Act IV of 1882 (Transfer of Property Act), s. 58—Pre-emption.

The transaction known to Muhammadan law as a *bai-bil-wafa* is a mortgage within the meaning of s. 58 of Act IV of 1882, and not a sale.

The plaintiff in a suit for pre-emption had, prior to the sale of the property claimed, executed a deed in respect of his share in the village in virtue of which he claimed the right to pre-empt, the material portion of which deed was as follows:—"Thirdly, if I, the vendor, or the heirs of me, the vendor, Ali Jan, *alias* Ali Ahmad, should pay off the entire consideration money mentioned above on the Puranmashi of Jeth Sudi 1299

* Second Appeal No. 1125 of 1889 from a decree of Rai Lalita Prasad, Subordinate Judge of Ghazipur, dated the 9th July 1889, reversing a decree of Maulvi Sayyid Zain-ul-abdin, Munsif of Korantadih, dated the 18th January 1889.

(1) I. L. R., 16 Cal., 473.

(2) I. L. R., 11 All., 438.

1892
 ALI AHMAD
 v.
 RAHMAT-
 ULLAH.

fasli to the said purchaser, she should without any objection or hesitation receive the money, and, returning the property sold, described above in the document, to me the vendor, revoke the sale."

Held that this deed was a *bai-bil-wafu* or mortgage by conditional sale, and that as the conditional sale had not become absolute at the time when the right of pre-emption accrued, the conditional vendor or mortgagor was still a shareholder in the village, and therefore had still a subsisting right of pre-emption. *Bhagwan Sahai v Bhagwan Din* (1) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Majid*, for the appellant.

Munshi *Kashi Prasad*, for the respondent.

EDGE, C. J., and TYRRELL, J.—The plaintiff, who is the appellant here, brought his suit for pre-emption in the Court of the Munsif of Korantadih. The suit is based on the village *wajib-ul-arz* and a sale-deed dated the 20th of October 1887. The vendor and vendee were made defendants to the suit. The defendant, who was the vendee under the deed of the 20th of October 1887, pleaded several matters by way of defence. Amongst other defences he alleged in effect that the plaintiff had, prior to the 20th of October 1887, ceased to be a shareholder in the village. In support of that defence the defendant vendee relied upon a deed which had been executed by the plaintiff on the 20th of September 1887, and which was registered on the 19th of October 1887, and contended that that deed was a deed of absolute sale by which all the interest of the plaintiff in the village had been assigned by him to a third party. On the other hand, the plaintiff contended that the deed of the 30th of September 1887 was a conditional sale-deed, and that the transaction evidenced by that deed was a mortgage by conditional sale within the meaning of s. 53 of the Transfer of Property Act, 1882 (Act No. IV of 1882), and that as mortgagor he was and continued to be a shareholder in the village within the meaning of the *wajib-ul-arz*.

The Munsif gave the plaintiff a decree. The defendant, the vendee, appealed. The lower appellate Court holding that, under the deed of the 30th of September 1887, the plaintiff had

(1) L. R., 17 I. A., 98 S. C. ; I. L. R., 12 All., 387.

absolutely assigned his share in the village, made a decree setting aside the decree of the first Court and dismissing the suit. From that decree this second appeal has been brought. The only issue determined by the lower appellate Court was that as to the effect of the deed of the 50th of September 1887.

The material condition in the deed of the 30th of September 1887, as translated by the head of the Translating Department of this Court, is as follows:—Thirdly, if I, the vendor, or the heirs of me the vendor, Ali Jan, *alms* Ali Ahmad, should pay off the entire consideration money mentioned above on the Purnamashi of Jeth Sudi 1299 fasli to the said purchaser, she should without any objection or hesitation receive the money, and, returning the property sold, described above in the document, to me the vendor, revoke the sale.” The words have been translated as “revoke the sale” are “*ikala bai*.”

Wilson's Glossary of Judicial and Revenue Terms (London, W. H. Allen & Co., 1855) gives the meaning of the word *ikala* thus:—“*Ikala*. The cancelling or dissolution of a sale on condition of furnishing an equivalent for the original price of the article; breaking a contract or engagement.” In the second edition of Hamilton's *Hidaya* by Grady “*ikala*” is thus defined:—“*Ikala* literally signifies to cancel. In the language of the law it means the cancelling or dissolution of a sale.” The lower appellate Court translated “*ikala bai*” as “re-sell.” Mr. *Abdul Majid* for the appellant relied upon s. 58 of the Transfer of Property Act, 1882, and the case of *Thumbusamy Moodelly v. Mahomed Hussain Rowthen* (1) and *Sahib-un-nissa Bibi v. Hafiza Bibi* (2).

Mr. *Kashi Prasad*, for the respondent, cited the cases of *Musammat Chando v. Hakeem Alim-ood-deen* (3); *Rajjo v. Lalman* (4); *Bhajan v. Mushtak Ahmad* (5); and *Bhagwan Sahai v. Bhagwan Din* (6).

(1) L. R., 2 I. A., 241 S. C.; (3) N.-W. P. H. C. Rep., 1874, p. 28.

I. L. R., 1 Mad., 1.

(4) I. L. R., 5 All., 189.

(2) I. L. R., 9 All., 218.

(5) I. L. R., 5 All., 324.

(6) L. R., 17 I. A., 98.

1892

ALI AHMAD
v.
RAHMAT-
ULLAH.

1892
 ALI AHMAD
 v.
 RAHMAT-
 ULLAH.

The decision in *Musammat Chando v. Hakeem Alim-ood-deen* (1) does not appear to us to have any bearing on the question before us, as the rights of the parties here must be determined by the contract or the village custom contained in the *wajib-ul-arz* and by the construction of the deed of the 30th September 1887, having regard to the Transfer of Property Act, 1882.

The case of *Rajjo v. Lalman* (2) does not apply. In that case the person who claimed to enforce a right of pre-emption under a *wajib-ul-arz* had in anticipation mortgaged to a stranger, i.e., to a person who was not a shareholder in the village, the very share which he sought to pre-empt.

The case of *Bhajan v. Mushtak Ahmad* (3) has no possible bearing on this case. The translation there evidenced by the instrument of July 1870 was an absolute sale. Whether the vendor in that case could have enforced the subsequent agreement of November 1870, we need not consider.]

Mr. *Keshi Prasad* strongly contended that the decision of their Lordships of the Privy Council in *Bhagwan Sahai v. Bhagwan Din* (4) governed this case, and that applying the principle of that decision we were bound to construe the deed of the 30th of September 1887 as a deed of absolute sale and not as a mortgage by conditional sale. If the facts in the two cases were the same, and if the Transfer of Property Act, 1882, was equally applicable to the two cases, we would without doubt be bound to take the law to be applied in this case from their Lordships of the Privy Council and to apply it without hesitation. It is doubtful how far, if at all, the attention of their Lordships of the Privy Council was drawn in the case of *Bhagwan Sahai v. Bhagwan Din* (4) to the origin and object of the *bai-bil-wafa* form of mortgage which was introduced to enable Muhammadans, contrary to the precept of the Muhammadan law against lending money at interest, to lend money at interest and to obtain security for the repayment of the principal

(1) N.-W. P. H. C. Rep., 1874, p. 28. (3) I. L. R., 5 All., 324.

(2) I. L. R., 5 All., 180.

(4) L. R., 17 I. A., 98; I. L. R., 12 All., 387.

and interest. It may be doubted if their Lordships of the Privy Council were informed that it was possible that the *bai-bil-wafa* mortgage transaction was, at least by the people of these Provinces, before their Lordships' decision, understood as being capable of being effected in different ways, as, for instance, by a deed which purported to assign the property absolutely, but which contained a stipulation for a right of re-purchase, or by two contemporaneous deeds, one of which purported to effect an absolute and unconditional sale, and the other of which was an agreement that the apparent vendor should have a right of re-purchase, and that, as a rule, the common lump price mentioned in each of such deeds did not represent the actual price paid by the apparent vendee, but represented that price plus interest calculated, frequently at a usurious rate, for the period during which it was agreed that the right of re-purchase should subsist, an arrangement which could hardly be consistent with such a transaction being one of an absolute sale and not one in the nature of a mortgage.

1883
ALI AHMAD
v.
RAHMAT-
ULLAH.

In such a case it would be hardly consistent with justice, equity or good conscience to treat the transaction as other than what it in fact was, or was admitted to have been, or to construe the documents as if they had been drafted by a conveyancer of Lincoln's Inn in accordance with English decisions which might be wholly unknown to the people of this country and wholly inapplicable to the form and object of the contract as understood by the parties in India, or to deprive either party of the remedy recognized by the Indian Limitation Act.

In this part of India for many centuries conveyancing followed the Muhammadan forms.

It may also be doubted if the attention of their Lordships of the Privy Council was drawn to the passage in the judgment of this Court in which it was stated, as was the fact:—

“The plaintiffs contended that the sale was a conditional sale or a mortgage by conditional sale. The correctness of this contention was admitted on behalf of the appellant.”

1892

ALI AHMAD
v.
RAHMAT-
ULLAH.

The appellant was the one of the defendants who had appealed from the decree of the Subordinate Judge of Cawnpore who had held that the transaction was one of mortgage. The appellant in that case was represented by two of the most experienced lawyers then practising in this Court, who had been for years familiar with the different forms in which a *bai-bil-wafa* mortgage transaction was effected in these Provinces. Unfortunately this Court did not think it necessary to state in its judgment its reasons for agreeing with what was conceded on behalf of the parties to the appeal, namely, that the transaction was one which was intended by the parties to it to be a transaction of mortgage. Whether any of those considerations would have influenced their Lordships of the Privy Council to take a different view of the transaction, we are unable to say. As in duty bound, we accept the decision as it stands, as an authoritative exposition of the law to be administered in this country in a similar case. This is an apparent distinction between that case and this. In that case the contract which was alleged by one side and admitted on behalf of the other side in this Court to be a contract of mortgage was evidenced, if at all, by two contemporaneous documents, whilst in this case the contract is contained in one document, and is obviously a mortgage within the meaning of clause (c) or of clause (e) of s. 58 of the Transfer of Property Act, 1882. It is not necessary for the purposes of this case to decide which of those clauses of the section applies to it. Taking that view of the transaction as evidenced by the deed of the 30th of September 1887, we hold that the plaintiff had not by reason of the mortgage of the 30th of September 1887 ceased to be a shareholder in the village, and that he was not by reason of his having mortgaged his share in the village disentitled to maintain this suit for pre-emption. As the other issues in the case have not been tried by the lower appellate Court, we remand the case, under s. 566 of the Code of Civil Procedure, for the trial and determination of the other issues raised by the memorandum of appeal which was filed in the lower appellate Court. Ten days will be allowed for filing objections after the return has been received.

Case remanded.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Mahmood, and Mr. Justice Knox.

1892
March 10.

DEOKI NANDAN RAI AND ANOTHER (APPLICANTS) v. TAPESRI LAL AND OTHERS (OPPOSITE PARTY).

Execution of decree—Default of purchaser at sale in execution—Deficiency in price arising on re-sale—Order against defaulter to make good such deficiency—Appeal—Civil Procedure Code, ss. 2, 293, 549, 558.

No appeal lies from an order under s. 293 of the Code of Civil Procedure directing a defaulting purchaser at a sale in execution of a decree to make good the loss happening on a re-sale occasioned by his default. *Ram Dial v. Ram Das* (1) and *Bajjnath Sahai v. Moheep Narain Singh* (2) dissented from. *Soudagar Mal v. Abdul Rahman Khan* (3), *Rahim Buksh v. Dhuri* (4) followed.

So held by EDGE, C. J., MAHMOOD and KNOX, JJ., STRAIGHT, J., dissenting.

THIS was an appeal under s. 10 of the Letters Patent from a judgment of Tyrrell, J. The appellants, Deoki Nandan Rai and Sheo Balak Rai, purchased certain immoveable property at an auction sale in execution of a decree on the 20th May 1888. The price at which the property was sold was Rs. 800. As the purchasers did not pay the purchase money within the time required by section 307 of the Civil Procedure Code, the sale was set aside, and the property was re-sold under section 308 on the 22nd August 1888, when it was purchased by one Baldeo Lal on behalf of Musammatt Sona Kuar for the sum of Rs. 245. Thereupon the decree-holder applied in the Court of the Munsif executing the decree to recover from the defaulting first purchasers the difference between the prices realized at the two sales, and these purchasers on their part filed objections. Those objections were, however, overruled, and the Munsif, acting under section 293 of the Code of Civil Procedure, ordered the purchasers to make good the deficiency. The objectors appealed to the Subordinate Judge of Ghazipur, who allowed the appeal, holding that as the officer conducting the sale had not certified under the provisions of section 293 the circumstances under which the re-sale took place

(1) I. L. R., 1 All., 181.

(3) Weekly Notes, 1890, p. 85.

(2) I. L. R., 16 Calc., 535.

(4) I. L. R., 12 All., 397.

1892 the Munsif was not competent to make the order under appeal.
 DECKI From this decision, the decree-holders appealed to the High Court.
 NANDAN RAI Munshi *Juala Prasad*, for the appellants.
 TAPESHI LAL. Mr. *J. E. Howard*, for the respondents.

TYRELL, J.—This is a second appeal from the appellate order made by the Subordinate Judge of Ghazipur reversing the decision of the Munsif executing the decree, who made an order under section 293 of the Civil Procedure Code directing the defaulting auction purchaser to make good the loss which his default brought about. The learned vakil, who appears for the decree-holders appellants, contends that the order of the Munsif was unappealable. It seems to me that the contention is sound. An order under section 293 is not appealable as an order under section 588 of the Civil Procedure Code. To be appealable, then, it must be regarded as an order under section 244. It is not such an order, for Deoki Nandan Rai, who made an abortive final bid at the first sale, cannot be said to be in any sense a party to the execution of the decree. A doubt as to appellate jurisdiction in regard to orders under section 293 was suggested in the Calcutta Court in *Ramdhani Sahai v. Rajrani Kooer* (1), and I am informed that the first bench of this Court has recently ruled that an order under section 293 is not appealable. Unfortunately I cannot find the judgment (2), but I have very little doubt that the order in question was unappealable. The decretal order of the Court below must be set aside; that of the Munsif restored, the appeal being decreed with all costs.

From this decree an appeal under s. 10 of the Letters Patent was filed by the defaulting purchasers, which appeal coming on to be heard by Edge, C. J., and Straight, J., was, by their orders of the 5th January 1892, directed to be laid before a Bench consisting of the Judges of the Court other than the Judge from whose decree the appeal was brought.

Mr. *T. Conlan*, for the appellants.

Munshi *Juala Prasad*, for the respondents.

(1) I. L. R., 7 Cal., 337.

(2) Weekly Notes, 1890, page 85.

MAHMOOD, J.—This is a Letters Patent Appeal under s. 10 from the judgment of my brother Tyrrell, in which he held, as his judgment shows, that no appeal lay either to the lower appellate Court or to him.

1892

DEOKI

NANDAN RAI

v.

TAPESRI LAL.

A preliminary difficulty occurred in my mind in this case as to whether or not an appeal lay to this Bench under s. 10 of the Letters Patent in view of the recent Full Bench case of *Muhammad Naimullah Khan v. Ihsanullah Khan* (1). But upon full consideration, and inasmuch as the ground of appeal contests the judgment of my brother Tyrrell, whatever view I may entertain as to the validity of the judgment, I am of opinion that this appeal lies. This view is consistent and indeed in conformity with what was ruled by me in an earlier case where I held that the mere circumstance that an appeal did not lie to the lower appellate Court does not oust the jurisdiction of a higher Court of appeal to hear an appeal from a decree passed by such lower appellate Court.

We are therefore seised of this case as an appeal, and as such I understand that the appeal comes before us and that this Bench has to deal with it. The case has come up for hearing before the learned Chief Justice and my brother Straight, and by their order of the 5th January 1892 they referred the whole case to us, namely, the Judges of the Full Bench. In that order of reference the points which really arise in the case have been succinctly but clearly stated, and I do not wish to add anything to what is said there.

What I have to consider is the solitary question which arises before me sitting here in the Full Bench, and that is this, namely, whether or not orders under s. 293 of the Code of Civil Procedure are matters which can be made a subject of appeal to any Court at all. In considering this question one thing is important, and that is this, that if any orders made under s. 293 are orders, you have to search for a right of appeal from those orders, and in that search the Code leaves no doubt in s. 588 that that search must be limited to the four corners of that section and nowhere else. So that if these orders are orders, as distinguished from decrees, then

(1) Weekly Notes, 1892, page 14.

1892 there is no doubt and the section is clear enough: I mean s. 588 is
 DEORI clear enough to show that it contains a prohibition as to appeals from
 NANDAN RAI orders other than those specified in that section. In that section
 v.
 TAPESRI LAL. there is one thing which I wish to point out, and for that I am
 indebted to the learned Chief Justice, namely, that whilst in cl. (16)
 orders under s. 294 are declared appealable, there is a significant
 silence as to the appealability of orders under s. 293, and this signi-
 ficance is all the more significant, because s. 294 is somewhat cog-
 nate in its nature to the provisions of s. 293 which immediately
 precedes it. Holding the rule *expressio unius exclusio alterius*,
 and taking that to be the sound principle of interpretation, I
 regard the absence of s. 293 from the various clauses of s. 588 as
 signifying that no orders under that section were to be rendered
 appealable.

Then comes a greater question upon which my judgment must
 proceed, and that is this. The difficulty over s. 293 arises over the
 last part of that section, because it says that the deficiency of the
 price "shall at the instance of either the judgment-creditor or the
 judgment-debtor be recoverable from the defaulter under the rules
 contained in this chapter for the execution of a decree for money."

I have quoted these words on purpose, because I have long
 held the view, expressed in numerous cases from the Bench in this
 Court, that whilst a clear distinction must be drawn between the
 rules of substantive law and the procedure law, so, in considering
 the rules of procedure itself, there must be a distinction drawn
 between that which is purely indicative of the *modus operandi* and
 that which is otherwise a rule of procedure only for the purposes
 attaining substantive rights when they are infringed. The only
 reason for holding that an order under s. 293 becomes an order
 such as that contemplated by s. 244 can be founded on the words
 I have already quoted, namely, that the deficiency of price "shall
 be recoverable from the defaulter under the rules contained in
 this chapter for the execution of a decree for money."

There is no doubt that such money can be so recovered, that is
 to say, by means of attachment, by arrest and by whatever

procedure there may be. The question is: Is it therefore an order which becomes a *decree* by dint of the definition of that term in s. 2 of the Civil Procedure Code? Now, there the Legislature in the first place fully realized that the word "*decree*" when loosely used may be confounded with "*order*" and that the word "*order*" when loosely used may be confounded with "*decree*," and therefore the definition there is very specific. It is needless to read the whole of that portion of the statute; but it is important to say this:—"*decree* means the formal expression of an adjudication upon any right claimed or defence set up in a Civil Court when such adjudication, so far as regards the Court expressing it, decides the *suit* or appeal."

1892

DECKI
NANDAN RAI
TAPESRI LAL.

Now I am indebted to the learned Chief Justice for the significance which I am going to attach to these two words "*suit*" and "*appeal*." A defaulting purchaser when ordered to pay up the deficiency:—Is he a "*suitor*" within the meaning of the word "*suit*," or an "*appellant*" within the meaning of the word "*appeal*?" If he is not a suitor, he cannot be an appellant, till he shows that the order of which he complains is an appealable order. Orders of this kind and character are really administrative orders. They do not partake of the nature of adjudication as that word is used in defining the word "*decree*." Nor do I think the definition of the word "*judgment-debtor*" applies to a person of that character, because the word "*judgment-debtor*" is defined to be "*any person against whom a decree or order has been made.*"

Again, the words "*judgment-debtor*" and "*decree-holder*" as defined in the same clause are correlative terms. Therefore, before we can call a defaulting purchaser a judgment-debtor, it is necessary to know who the decree-holder is. Who is the decree-holder under the enactment in a quarrel with regard to price? There is no decree-holder. Because a man who chooses to rush into an auction-room and bids imprudently and goes the length of paying up the one-fourth of the price and chooses not to pay up the rest, or cannot pay it up, suffers from the results of his own imprudence. He is not a judgment-debtor; he must forfeit the price and he

1892 must suffer the consequences, and there is no decree-holder. XIV
cause of this character.

DEOKI
NANDAN RAI
v.
TAPEERI LAL.

This being my view, I have to consider the case law as it stands. I do not intend to do more than first of all refer to the Full Bench ruling of this Court in *Ram Dial v. Ram Das* (1), where it was held that an appeal lay from orders under s. 254 of Act VIII of 1859 read with s. 11 of Act XXIII of 1861 for the reasons mentioned in that judgment. The next case I wish to refer to is the case of *Bajjnath Sahai v. Moheep Narain Singh* (2), where Tottenham and Banerjee, JJ., delivered a judgment which is now before me, and the first paragraph of which is the one applicable to the point now before us and undoubtedly supports the contention that an appeal would lie under s. 293, and I think Mr. Conlan, in the able argument which he addressed to us, was fully entitled to cite that as a case in support of his contention.

The next case I wish to refer to is a Division Bench ruling of this Court, namely, the case of *Soudagar Mal v. Abdul Rahman Khan* (3), where the learned Chief Justice and the late Mr. Justice Brodhurst delivered a joint judgment and held that such orders as those contemplated by s. 293 were not appealable. The report of that case shows that no early cases or authorities were cited, because there is no reference in the judgment, and I am assured by the learned Chief Justice that no such authorities were cited.

Then the last, and what I regard as the most important, case for the purposes of my judgment is the case of *Rahim Bakhsh v. Dhuri* (4). That judgment indicates that all the authorities which were then existing, including the Full Bench ruling of this Court in *Ram Dial v. Ram Das* (1), as also the ruling of the Calcutta High Court in *Bajjnath Sahai v. Moheep Narain Singh* (2) were cited and considered by the learned Chief Justice and the late Mr. Justice Brodhurst. In that judgment they distinctly differed from the view

(1) I. L. R., 1 All., 131.

(2) I. L. R., 16 Calc., 535.

(3) Weekly Notes, 1890, p. 85.

(4) I. L. R., 12 All., 397.

taken in the Full Bench case of *Ram Dial v. Ram Das* (1), and also from the Calcutta Division Bench ruling in *Baigunath Sahai v. Mheep Narain Singh* (2). 1892

DEORI
NANDAN RAI
v.

Such, then, is the case law upon the subject, and having con- sidered not only these but numerous other cases which have been cited during the course of the argument, I have no doubt that the rule laid down in *Rahim Bakhsh v. Dhuri* (3) is a sound rule of law. In saying so, I maintain that, although s. 293 of the Code of Civil Procedure renders rules applicable to recovery of money in execution of decree applicable also to recovery of money from the defaulting purchaser, yet rules which are intended only to apply to the *modus operandi* of the recovery of money cannot give any right of appeal. I take it to be an undoubted doctrine of interpreting statutes that the maxim *ubi jus ibi remedium* does not include a right of appeal. It must be expressly granted by the Legislature, and it is not a right which arises out of common law. If the Legislature intended that quarrels such as those arising under s. 293 of the Code should be appealable, there could be nothing easier than adding another clause immediately above clause (16) of s. 583 granting a right of appeal. But there is no such clause to be found. There is no other provision in the Code to show that an appeal lies.

It has been contended that to apply rules which are so stringent as those required by the Chapter of the Code relating to the execution of decrees to a defaulting purchaser and not to give him a right of appeal is a hardship upon him. This argument I have weighed in my mind. At first sight it appears that there is hardship, but as a matter of fact the law intends that imprudent bidders at auction must not have those rights, and that the functions to be discharged by the Courts of justice such as those contemplated by s. 293 should be peremptory and final, subject of course to such rights as the defaulting purchaser may otherwise have in regard to the recovery of money which he has paid up. I therefore hold that the principle of the Full Bench ruling in *Ram Dial v. Ram Das* (1)

(1) I. L. R., 1 All., 181.

(2) I. L. R., 16 Calc., 535.

(3) I. L. R., 12 All., 397.

1892 is erroneous; that the views expressed in the Division Bench ruling in *Soudagar Mal v. Abdul Rahman Khan* (1) and in the recent case of *Rahim Bakhsh v. Dhuri* (2) are correct; and that the judgment of my brother Tyrrell, from which this appeal has been laid, was correct, and I would therefore dismiss the appeal.

DECKI
NANDAN RAI
v.
TAPESRI LAL.

KNOX, J.—The order which was before my brother Tyrrell in appeal purported to have been an order passed under s. 293 of the Code of Civil Procedure. Whether an order is or is not necessary, or can or cannot be passed under s. 293, may be open to question. The section itself does not in terms provide for an order. All that it says is that when a re-sale has been made under the Code by reason of a purchaser's default and the result of such re-sale shows that there is a deficiency of price, and that there are certain expenses which have to be recovered from some one, that deficiency and those expenses shall be certified to the Court by the officer holding the same. It may well be conceived that numerous instances would arise when no order of any kind would be passed upon such certificate, and, as I said before, I do not find that s. 293 requires a Court to pass an order upon such certificate. If there is a decision passed by the Court under s. 293, in my opinion such a decision cannot at the highest amount to anything more than an order, and as s. 588 of the Code of Civil Procedure makes no provision for appeals from such orders, no appeal will lie, and the judgment of my brother Tyrrell is in that view a judgment which, in my opinion, must be upheld. I might therefore leave the case at this stage, but it has been pressed before us by Mr. Conlan, who appeared for the appellants, that much injustice might arise to the defaulting purchaser, if he can in no way appeal from the decision of the Court, if there be any, under s. 293, and the consequences which flow from that decision. We are not called upon to determine in the present case the question whether an appeal does or does not lie from decisions resulting after the proceedings have passed the stage contemplated in s. 293. But it seems to me that when such a question arises for argument hereafter, and when the judgment-creditor or the

(1) Weekly Notes, 1890, p. 25.

(2) I. L. R., 12 All., 397.

judgment-debtor proceeds to recover from the defaulter the deficiency mentioned in s. 293, the following facts will have to be considered. Such judgment-creditor or judgment-debtor, as the case may be, will have to follow the rules contained in Chapter XIX for the execution of a decree for money. His first step will be probably to take the certificate to the Court through whom he wishes to recover, and put it in as the foundation of proceedings in execution. Such proceedings will, in the ordinary course of things, lead up to an adjudication, if any question arises, and that adjudication, it appears to me, subject to what I have said above, would be a decree. For these reasons I would dismiss this appeal with costs.

1892
DEOKI
NANPAN RAI
v.
TAPESHI LAL.

EDGE, C. J.—I am still of the opinion which I expressed in my judgments in the case of *Soudagar Mal v. Abdul Rahman Khan* (1) and *Rahim Bakhsh v. Dhuri* (2). I would only add that the order passed under s. 293 of the Code of Civil Procedure, which is questioned here, if it is not a decree, must be an order within the meaning of that word as defined in s. 2 of the Code. For I find that an order is defined as “the formal expression of any decision of a Civil Court which is not a decree as above defined.” Consequently, if it is an order, it was an order within the meaning of that word as used in the Code of Civil Procedure, and no appeal lies under s. 588 from such an order made under s. 293 of that Code. It cannot, in my opinion, be considered to be a decree which decides the suit or appeal. It is not in fact the decree in the suit, and no other suit, as that word is used in the Code of Civil Procedure, ever was commenced. A suit, as that word is used in the Code of Civil Procedure, has a definite meaning. It is a proceeding commenced by the filing of a plaint; written statements have to be filed, and certain specific procedure is applicable to it. Then again, as I have said in my judgment in one of the former cases, I fail to see how a defaulting purchaser at an auction sale can be considered as a party to the suit in which the decree was passed, or as a representative, as such, of any parties to the suit within the meaning of s. 244 of the Code. For these reasons I am of opinion that,

(1) Weekly Notes, 1890, p. 85.

(2) I. L. R., 12 All., 397.

1892 although the facts may have been correctly found by the Subordinate Judge in this case, the appellant here, whatever remedy he may have, has not got a remedy by way of appeal. If he has any other remedy, he would not apparently be debarred from it by reason of s. 244, which, in my judgment, does not apply to his case. I would therefore dismiss this appeal with costs.

DEOKI
NANDAN RAI
v.
TAPESRI LAL.

STRAIGHT, J.—I am strongly inclined to hold that an appeal does lie. But as four members of the Court are of the contrary opinion and as I am shortly to leave the Court, I do not think that any useful purpose will be served by my entering at length into the reasons that lead me to that view. I therefore simply say I do not concur in the judgments that have been delivered.

ORDER OF COURT.—The order of the Court is, consequently, that this appeal is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

1893
April 7

Before Sir John Edge, Knight, Chief Justice, and Mr. Justice Blair.

KASHI RAM (PETITIONER) v. MANI RAM (OPPOSITE PARTY).*

Execution of decree—Order dismissing application under s. 295 of the Civil Procedure Code for participation in assets—Civil Procedure Code, ss. 2, 244, 295—Appeal.

No appeal will lie from an order under s. 295 of the Code of Civil Procedure dismissing, on the ground that the decree was barred by limitation, a decree-holder's application to share in the assets realized under another decree against the same judgment-debtor. Such an order cannot be regarded as a decree under s. 244 read with s. 2 of the said Code.

The facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal Nehru*, for the appellant.

Babu *Rajendra Nath Mukerji*, for the respondent.

* First Appeal No. 77 of 1891 from an order of A. McMillan, Esq., District Judge of Cawnpore, dated the 25th May 1891.

EDGE, C. J., and BLAIR, J.—The appellant here put his decree in execution in the Court of the Subordinate Judge of Cawnpore. The respondent had a decree against the same judgment-debtor, and was proceeding in execution of his decree in the Court of a Munsif. The respondent got his execution proceedings transferred to the Court of the Subordinate Judge, and applied under s. 295 of the Code of Civil Procedure to participate in the assets. The Subordinate Judge, holding that the respondent's decree was time-barred, made an order refusing him participation in the assets. On that the respondent here appealed against that order to the Court of the District Judge. The District Judge entertained the appeal, set aside the order of the Subordinate Judge, and remanded the case to the Court of the Subordinate Judge. From that order of remand this appeal has been brought. An order passed under s. 295 is not an order appealable. Section 588 of the Code prohibits an appeal against any order passed under s. 295. The question then remains, was the order of the Subordinate Judge appealable as a decree, reading "decree" as defined in s. 2 of the Code. Unless the order in question was an order under s. 244 of the Code, it would not be a decree as defined in s. 2. The parties to the appeal below were the respondent here, a decree-holder, and the appellant here, another decree-holder. The judgment-debtor was not a party to the appeal below. Consequently we have only to consider whether the question decided below was a question which arose between the parties to the suit in which the decree was passed or their representatives within the meaning of cl. (c) of s. 244. The parties to the appeal below were not parties to any common suit. Each was a decree-holder in his own separate suit, and the only person common to both suits was the judgment-debtor. Now in those proceedings these decree-holders could not be treated as representatives of each other or of the judgment-debtor; consequently we cannot treat the order of the Subordinate Judge as one which was made or capable of being made under s. 244 of the Code. An appeal is a creation of statute. There is, so far as we can see, no section in the Code of Civil Procedure which gave an appeal from the order of the

1892

KASHI RAM
v.
MANI RAM.

1892
KASHI RAM
v.
MANI RAM.

Subordinate Judge, but there is a provision in s. 295 allowing a party a right of suit in a case of this kind. For these reasons we are of opinion that the appeal below did not lie. We accordingly allow this appeal with costs here and in the lower appellate Court, and, setting aside the order of remand, we reinstate the order of the Subordinate Judge with costs.

Appeal decreed.

EXTRAORDINARY ORIGINAL CRIMINAL.

Before Mr. Justice Knox.

1892
April 18.

QUEEN-EMPRESS v. G. W. HAYFIELD AND ANOTHER.

Practice—Sessions trial—Adducing evidence for the defence—Documents produced for cross-examination of Crown witness—Right of reply—Criminal Procedure Code, ss. 289, 292—Witness for Crown tendered at Sessions trial who had not been examined by the committing Magistrate.

In a trial before a High Court or a Court of Session evidence for the defence cannot be adduced until the close of the case for the prosecution; but counsel for the defence may, while a witness for the Crown is under cross-examination, put documents to him, and if in so doing counsel reads or causes to be read to the Court documents, he thereby impliedly undertakes to put those documents in as evidence at the proper time. When such documents as aforesaid are filed in Court as evidence, or any other documentary evidence is put in by the defence, the defence has "adduced evidence" within the meaning of ss. 289 *et seq.* of the Code of Criminal Procedure, so as to give the prosecution a right of reply, though no witnesses may be called for the defence.

In a trial at the Criminal Sessions of the High Court, during the cross-examination of one of the witnesses for the Crown, counsel for the defence put certain documents to the witness, and these were read to the Court and jury and marked as exhibits as evidence for the defence, and were filed with the record in the same way as the evidence for the prosecution had been marked and filed. During the cross-examination of the next witness a similar course was pursued, and after the cross-examination had continued for some time, counsel for the defence applied to the Court for a ruling as to whether the fact of documents having been used during cross-examination in the manner above stated would, under s. 292 of the Code of Criminal Procedure, entitle the Crown to a reply, in the event of the accused not calling witnesses.

Held that although, as a matter of order, such a question would be better raised either when the first document intended to be used in this way was put to a witness, or when the accused was asked if he meant to adduce

evidence, yet there was nothing in the Code of Criminal Procedure to prevent the Court from deciding the question at any other stage, and that, under the special circumstances of the case, it might be considered then.

Held also that the use of the documents in the manner above stated gave the prosecution a right of reply. *Queen-Empress v. Grees Chunder Banerji* (1), *Empress of India v. Kaliprosonno Doss* (2), *Queen-Empress v. Solomon* (3), and *Queen-Empress v. Krishnaji Baburao Bulell* (4), dissented from.

At a trial before the High Court or the Court of Session, the Crown cannot demand as of right that any witness who was not examined by the committing Magistrate either before commitment or, under s. 219 of the Code, after it, should be called and examined. The Court may call and examine such a witness if it considers it necessary in the interests of justice.

THIS was a trial before Knox, J., and a jury at the Criminal Sessions of the High Court. The accused, George William Hayfield, was charged with offences punishable under ss. 420, 420 read with 511, and 436 read with 107 of the Indian Penal Code. During the course of the case for the prosecution an application was made to the Court by the Public Prosecutor that a certain Mr. Garstin might be examined as a witness for the Crown. Mr. Garstin was not examined as a witness by the committing Magistrate either at the time of the inquiry in the Magistrate's Court or subsequently under s. 219 of the Code of Criminal Procedure. The defence objected to the proposed examination of Mr. Garstin.

The Public Prosecutor (The Hon. G. T. Spankie), for the prosecution.

Mr. W. M. Colvin, Mr. A. Strachey and Mr. T. E. Strachey, for the prisoner.

KNOX, J.—With reference to the application of yesterday that Mr. Garstin might be examined as a witness for the Crown, my ruling is as follows:—

Mr. Garstin was not examined as a witness by the committing Magistrate: he was not examined by the Crown under the supplementary provisions of s. 219 of the Code of Criminal Procedure, and up to the present the accused have no knowledge of the nature

(1) I. L. R., 10 Calc., 1024.

(2) I. L. R., 14 Calc., 215.

(3) I. L. R., 17 Calc., 930.

(4) I. L. R., 14 Bom., 430.

1892

QUEEN-
EMPRESS
v.

G W. HAY-
FIELD.

1892 of the evidence which he may give, how it may affect them, and therefore cannot say whether or not, if it had been given at the preliminary inquiry, they would have cited evidence to rebut it.

QUEEN-
EMPRESS
v.
G. W. HAY-
FIELD.

It was the intention of the law, so far as can be gathered from the provisions of the Code, that an accused should not be put on his trial until all the evidence that was forthcoming, and of the existence of which the Crown might reasonably be supposed to be aware, had been put on record and in his presence, if possible; and further, it is provided that if the accused so require a copy of all such evidence so recorded be given to him before his trial commenced.

There was, in my opinion, no intention, and therefore no provision made for the purpose, that the Crown could demand of right that any witness, not examined by them in the preliminary inquiry should be called and examined at the trial. It is true that in the present instance certain witnesses, among them Mr. Garstin, have been summoned by order of the Court, but no notice was given to the accused, and I therefore regard their being summoned as a purely ministerial act and in no way binding upon myself in the sense that the witness so summoned is, as a matter of course, to be examined.

I therefore rule that Mr. Garstin cannot give evidence on the part of the Crown to-day. This will not preclude the Court, if it considers it necessary in the interests of justice, from calling and examining him as a witness cited by the Court; and to prevent any hardship to the accused, I direct that the papers to which his evidence and that of Kamta Prasad are supposed to refer be placed to-day at the disposal of the counsel for the accused.

[The case for the prosecution then proceeded. During the cross-examination of one of the witnesses, counsel for the defence put certain letters and other documents to the witness, some for the purpose of contradicting his testimony and others for the purpose of proving that he was an accomplice in the commission of the offences charged against the accused, so as to lay the foundation for argument that his evidence should not be acted upon without corroboration. These documents were read to the Court and jury and

marked as exhibits as evidence for the defence, and were filed with the record in the same way as the evidence for the prosecution had been marked and filed. During the cross-examination of the next witness a similar course was pursued, and, after the cross-examination had continued for some time, counsel for the defence applied to the Court for a ruling as to whether the fact of documents having been used during cross-examination in the manner above stated would, under s. 292 of the Code of Criminal Procedure, entitle the Crown to a reply in the event of the defence not calling witnesses. The Public Prosecutor objected that the point was prematurely raised at the present stage of the trial.]

KNOX, J.—Upon the conclusion of the examination-in-chief of one of the witnesses for the Crown, Mr. *Strachey*, on the part of the defence, raised the question whether, if certain documents were tendered to witnesses for the Crown with the intention of using those documents as evidence hereafter, the Crown would be entitled to the right of reply. The Public Prosecutor questioned the right of the counsel for the defence to raise this question at the present stage of the trial. Counsel for the defence referred me to the cases *Queen-Empress v. Solomon* (1), *Empress of India v. Kaliprosunno Doss* (2), and *Queen-Empress v. Krishnaji Baburav Bulell* (3), and contended that this question might be raised at any point during the progress of the trial. The Public Prosecutor suggests that those cases established nothing further than that there were two stages at which this question might be raised. First, when the first document intended to be used in this way was put to a witness, and secondly, when the accused is asked if he means to adduce evidence. I am clearly of opinion that these two stages would be the preferable ones in which as a point of order such a question should be raised, but there are special circumstances in this case, one being that the trial will probably have to be adjourned, and the counsel for the defence assures me that my ruling on the point will probably determine whether the witnesses are to be put to the inconvenience of staying

1892

QUEEN-
EMPRESSG. W. HAY-
FIELD.

(1) I. L. R., 17 Cal., 980. (2) I. L. R., 14 Cal., 245.

(3) I. L. R., 14 Bom., 430.

1892

QUEEN-
EMPRESSG. W. HAY-
FIELD.

over such adjournment. On this ground, therefore, and seeing nothing in the Code of Criminal Procedure which would prevent me from deciding the question at any other stage beyond those named, I rule that the question may be considered now.

[The question was then argued.]

Knox, J.—The question on which I am asked to rule is as follows:—"Can counsel for the accused during the cross-examination of a witness called for the prosecution at a Sessions trial and before the close of the evidence for the prosecution, read or cause to be read to the Court and Jury a letter or other document written by the witness which has not been put in evidence by the prosecution or by the Judge presiding, without giving a right of reply to counsel for the prosecution." As this was a question involving procedure, I thought it best to take counsel with my brother Judges in the matter before ruling. It was contended for the prisoner that the tendering of such documents does not entitle counsel for the prosecution to a right of reply, and in support of that contention I was referred to the following cases:—*Queen-Empress v. Grees Chunder Banerji* (1), *Empress of India v. Kaliprosonno Doss* (2), *Queen Empress v. Solomon* (3), and *Queen-Empress v. Krishnaji Baburav Bulell* (4). In *Queen-Empress v. Grees Chunder Banerji* (1), in which an accused during the cross-examination of a witness used certain documents and those documents were tendered in evidence and marked as exhibits; at the same time it was intimated by counsel for the defence that he would contend that by so doing he did not give counsel for the prosecution a right of reply on the case in the event of no witnesses for the defence being called, Mr. Justice Field held that the prosecution was not entitled to a reply. In *Empress of India v. Kaliprosonno Doss* (2), Mr. Justice Trevelyan gave a similar ruling, following the ruling already quoted. In *Queen-Empress v. Solomon* (3), Mr. Justice Wilson also held to the same effect after it had been pointed out to him that the Madras High Court had decided to a

(1) I. L. R., 10 Calc., 1024. (3) I. L. R., 17 Calc., 930.

(2) I. L. R., 14 Calc., 245. (4) I. L. R., 14 Bom., 430.

contrary effect. This case is of some importance, as therein it was pointed out to Mr. Justice Wilson by Mr. Pugh, who appeared for the prosecution, that he had been informed that it was the practice of the North-Western Provinces High Court under such circumstances to allow a reply. In *Queen-Empress v. Krishnaji Baburav Bulell* (1), Mr. Justice Farran followed the rulings of the Calcutta Court. No precedent of this Court has been pointed out, but an allusion has been made to the procedure which is said to have taken place during the trial of *Queen-Empress v. Trotter* (2); but it is admitted that in that case the question was not argued, and that when the point was raised the documents were put on the record by the presiding Judge and not by counsel for the defence. Upon these authorities it was contended by counsel for the defence that he was entitled to read or have read to the Court and jury before the prosecution had concluded their case a letter or other documents, which a witness for the prosecution admitted in cross-examination had been written by him and which contained statements on relevant matters, without giving the prosecution a right of reply. That contention involves the assumption that a letter or other document may be read to the jury in evidence in a trial without such document having been put in evidence and without any obligation being incurred to put such document in evidence. This is an assumption which cannot be supported. The fact that a witness for the prosecution has admitted in cross-examination that a document was written by him does not make it incumbent on the prosecution to put that document in as part of the evidence for the prosecution, although that document may contain a statement relevant as contradicting, explaining, or raising a doubt as to the value of the oral evidence of the witness. Thus the prosecution might be satisfied that the oral evidence was true and that the document had been prepared in collusion with the accused or fabricated as a trap or might have other good reasons for declining to put in a document of which up to that moment it had had no notice as evidence for the prosecution. Nor is it incumbent on the presiding Judge to exercise his right of putting the document

1892

QUEEN-
EMPRESS
v.
W. HAY-
FIELD.

(1) I. L. R., 14 Bom., 430.

(2) Not reported.

1892

QUEEN-
EMPRESSv.
G. W. HAY-
FIELD.

in as evidence. If the accused desires to have the benefit of such document as evidence, and he cannot have the benefit of it as evidence unless it is put in as evidence, he must put it in as evidence, if neither the prosecution nor the presiding Judge will put it in as evidence. The difficulty arises from the fact that it may be convenient and desirable that the document should be read to the jury whilst the witness is under cross-examination ; and from the fact that s. 289 of the Code of Criminal Procedure does not apparently authorize the accused to adduce evidence until the examination of the witnesses for the prosecution and the prisoner's own examination have been concluded. Ss. 286 to 296 of the Code prescribe the procedure to be followed in Sessions trials from the opening of the case for the prosecution to the close of the case for the prosecution and defence. I can find nothing in any of those sections to suggest that an accused person or his pleader can, before the examination of the witnesses for the prosecution has been concluded, adduce evidence for the defence: indeed, the language of s. 289 strongly indicates that evidence for the defence can only be adduced at a Sessions trial after the examination of the witnesses for the prosecution and the examination of the accused are concluded, for then, and not till then, is the accused to be asked whether he means to adduce evidence, a procedure which is inconsistent with a right or the exercise of a right by or on behalf of an accused to adduce evidence at an earlier stage of the trial. There is, however, nothing in any of those sections to show that an accused person is precluded from stating for his own benefit, or intimating at any time whilst the witnesses for the prosecution are being examined, that he intends to adduce evidence for his defence. It has been contended that the reading to the jury in Court by counsel for the accused, or the causing a witness called for the prosecution, to read a letter or other document written by the witness, which has not otherwise been put in evidence, is not an adducing evidence by or on behalf of the accused and does not amount to an intimation on behalf of the accused that such document will at the proper time be put in evidence by the accused and that in that respect such

document stands on a footing different from that of other documentary evidence. It appears to me that the fact that the letter or document was admitted by the witness to have been written by him is immaterial, and the position would be the same if the letter or document was one which the witness had sworn he had not written and had no previous knowledge of, and had stated in his evidence to be in the writing of some one else, as, *e.g.*, of another witness for the prosecution. In either case neither the prosecution nor the defence could read or have the letter read to the Court and jury, that is, use it as evidence, until it was put in as evidence, or, to use the language of the Code, until it had been adduced as evidence, or unless upon an undertaking that the party desiring to use it as evidence would at the proper time put it in formally as evidence. Such an undertaking should be carried out; with the result that the prosecution would be entitled to a reply. Such an undertaking is, as a general rule, I understand, implied and not expressed. A similar undertaking is implied when counsel in opening the case for the prosecution, or the accused or his pleader in opening the case for the defence, reads to the Court a letter or other document not at that time put in as evidence. If the reading of the letter or document at that stage of the trial is not objected to, the party reading it impliedly undertakes to put it in as evidence at the proper time as part of the evidence adduced by him. If the opposite party objects to the letter or document being read to the jury until it is proved and put in as evidence, it cannot be read to the jury until it is proved and put in as evidence in the case. It is obvious that a letter or document cannot be read to the jury unless it has been put in as evidence at the trial, or unless the party using it as evidence expressly or impliedly undertakes to put it in as evidence at the proper time.

If a fact has to be proved at a criminal trial, the evidence which proves that fact must be adduced. If such fact is to be proved by oral evidence, the oral evidence must be adduced. Similarly if the fact is to be proved by documentary evidence, the documentary evidence must be adduced. The only essential difference is that the

1892

QUEEN-
EMPRESS

v.

G. W. HAY-
FIELD.

1892

QUEEN-
EMPRESS
v.
G. W. HALL-
FIELD.

oral evidence of the fact may be obtained from the cross-examination of a witness of the opposite party without that witness being made a witness for the party who in cross-examination has extracted the evidence of the fact which he wishes to prove. When a document has been put in evidence by either side its contents are before the jury, and its contents may or may not afford evidence, or may be the sole admissible evidence, of a particular fact. The document so put in evidence is, no matter for what purpose it may be used by either party, evidence adduced by the party who put it in as evidence. An example of how a document in the writing of a witness may be used without involving the necessity of putting the document in as evidence is afforded by s. 145 of the Indian Evidence Act. Under that section:—"a witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being proved." In such cross-examination the exact words used in the writing as to which it is desired to obtain an admission should be put to the witness. If the witness admits that he did write those words, that admission is evidence of the fact that on a previous occasion he made the statement which those words convey. If the witness denies that he ever made that statement, the person who is cross-examining can put the document into the hands of the witness and tell him to look at it, or at a portion of it, and ask him if he still denies having made that particular statement. The witness may either admit or deny that he made the statement. So far the person cross-examining the witness has incurred no obligation to put the document in as evidence. If the witness admits that he made the statement, the person cross-examining has obtained all that is necessary and is under no obligation to put the document in as evidence. If the witness denies that he made the statement, the person cross-examining has two courses open to him. He may decide not to put the document in as evidence; in which case he must accept the denial of the witness as conclusive, and lay himself open to the observation that he put to the witness a question suggesting that the document contained a statement which in fact it did not. On the other

hand, he may decide to put the document in as evidence showing that the witness had on a previous occasion made a particular statement and then contradicted it. In the latter case the document when proved should be put in formally as evidence when the party who intends to use it as evidence is adducing his evidence. Similarly, if a witness in cross-examination denies that on a previous occasion he made on a relevant matter an oral statement inconsistent with, or which would give a different complexion to, his evidence at the trial, the person cross-examining the witness must accept the denial as conclusive, unless he can, by the cross-examination of the person to whom the oral statement was made, in case such witness happens to be a witness for the other side, or by calling such person as a witness for his own side when he is adducing his evidence, prove that the statement was in fact made.

1892

QUEEN-
EMPRESS
v.
G. W. HAY-
FIELD.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell, and Mr. Justice Blair.

1892
April 20.

SANT LAL AND OTHERS (JUDGMENT-DEBTORS) v. SRI KISHEN AND ANOTHER (DECREE-HOLDERS).*

Rules of Court of the 30th November 1889—Pratice—Memorandum of appeal—Appeal described as “first appeal from order” instead of first appeal from decree.

It is not a fatal objection to an appeal that the same is described in the memorandum as “First appeal from Order” being in reality a First appeal from a decree, it not being shown that the respondent was in any way prejudiced by such misdescription or that by reason thereof an insufficient stamp was placed on the memorandum. *Kedar Nath v. Lalji Sahai* (1) *quoad* this point distinguished.

THIS was a reference made at the instance of Mahmood, J., to a Bench of three Judges. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Mr. *Abdul Majid* and Mr. *Malcomson*, for the appellants.

* First Appeal No. 239 of 1890 from a decree of Rai Pyare Lal, Subordinate Judge of Meerut, dated the 8th February 1890.

(1) I. L. R., 12 All., 61.

1892

SANT LAL

v.

SRI KISHEN.

Munshi Ram Prasad and Babu Sirish Chandar, for the respondents.

EDGE, C. J., TYRRELL and BLAIR, JJ.—In this case the memorandum of appeal when presented and admitted was headed “First Appeal from Order.” Subsequently it appeared that the order in question was an order under s. 244 of the Code of Civil Procedure, and consequently came within the definition of decree, as decree is defined in s. 2 of that Code. It was contended on the authority of the decision of a Divisional Bench in the case of *Kedar Nath v. Lalji Sahai* (1), and on the authority of an unreported case, First Appeal from Order No. 70 of 1890, decided by a Divisional Bench on the 9th January 1891, that the appeal having been misdescribed should be dismissed. On the other hand, it was contended on the authority of an unreported decision of a Divisional Bench in First Appeal from Order No. 15 of 1890, decided on the 15th April 1890, that the misdescription, if any, might be corrected and the appeal heard. The proper description of the appeal in question, according to the practice of this Court at the time when the appeal was presented, was simply “First Appeal.” That is the practice as embodied in rule 9 of the Rules of Court of the 30th November 1889. The misdescription, if it is one, did not take any one by surprise. It did not in any respect affect the stamp on which under the Court Fees Act the memorandum should be presented, whether it was a memorandum of appeal from a decree or a memorandum of appeal from an order strictly so called. The decision of the Divisional Bench reported in the Indian Law Reports, 12 All., p. 61, was apparently based on the former practice of this Court and related, as appears by the dates, to a memorandum of appeal which had been presented before the rules of Court of the 30th November 1889 came into force. The decision in the unreported case, First Appeal from Order No. 70 of 1890, was in a case in which no application to amend the memorandum of appeal was apparently made. The memorandum of appeal has been already amended in this case, and we are of opinion that the appeal should be heard as a First Appeal from a decree as a decree is defined in

(1) I. L. R., 12 All., 61.

s. 2 of the Code. We do not for one moment suggest that an application for revision under s. 622 could be treated as a memorandum of appeal from a decree or an order.

1892

SANT LAL
v.
SRI KISHEN.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

1892

May 4

SRI KISHEN (PLAINTIFF) v. ISHRI AND ANOTHER (DEFENDANTS).*

Land-holder and tenant—Suit for ejectment against occupancy tenant and his mortgagee—Limitation—Act XV of 1877—Act XII of 1881, s. 94.

The plaintiff, a zamindar, sued one Ishri, an occupancy tenant, for ejectment under s. 93 (b) of the N.-W. P. Rent Act (XII of 1881), and to that suit one C. D., a mortgagee of the occupancy holding who had obtained a foreclosure decree against the occupancy tenant, got himself made a party defendant under s. 112A of the Act. The pleadings, however, were not amended and the suit proceeded to appeal before the District Judge.

Held that under the above circumstances the suit as against C. D., the intervening defendant (who, so far as the plaintiff was concerned, was a trespasser) was of a civil nature and therefore subject to the ordinary rules of limitation as laid down in the Indian Limitation Act and not to the special limitation prescribed by s. 94 of Act XII of 1881.

The facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Pandit *Bishambar Nath* and Babu *Durga Charan Banerji*, for the respondents.

EDGE, C. J., and BLAIR, J.—The appellants are representatives of the plaintiff in the suit. The plaintiff brought his suit in a Court of Revenue under s. 93, cl. (o), of Act No. XII of 1881 to eject an occupancy tenant who was not a tenant at fixed rates. The tenant was one Ishri. The plaintiff relied for the maintenance of his suit on the fact that Ishri had, on the 4th August 1881, mortgaged his occupancy holding to one Ganga Din, and that Ganga Din, on the 21st December 1883, had got a decree for foreclosure of his mortgage. After the suit had been instituted, Ganga Din, on his own application, was made a party to the suit.

* Second Appeal No. 90 of 1890 from a decree of G. J. Nicholls, Esq., District Judge of Cawnpore, dated the 30th November 1889, confirming a decree of Maulvi Muhammad Jawad, Assistant Collector of Cawnpore, dated the 22nd April 1889.

1892 under s. 112 (a) of Act XII of 1881. No amendment of the pleadings took place, but the suit proceeded against Ishri and Ganga Din. The Court of Revenue dismissed the suit on the ground of limitation, applying s. 94 of Act No. XII of 1881. The plaintiff appealed to the District Judge and he dismissed the appeal on the ground of limitation, applying the same section as that which has been applied by the Court of Revenue.

SRI KISHEN
v.
ISHRI.

From the decree of the District Judge this appeal has been brought by the plaintiff. It is quite clear that, applying the principle of the Full Bench decision in *Madho Lal v. Sheo Persad Misor* (1), the suit, apart altogether from any question of limitation, cannot be maintained as against Ishri. This appeal consequently, as against him, is dismissed. As to the position of Ganga Din, the main difficulty has arisen in this Court from the fact that no amendment of pleadings was made. It is quite clear, however, from the record what his case was. His case was that he, by reason of the mortgage and the decree of foreclosure, took title to the occupancy holding, and if not in possession was entitled to possession, and further that the limitation provided by s. 94 of Act No. XII of 1881 applied to his case. Now the suit originally, into which Ganga Din of his own motion intruded himself as a defendant, was one of ejectment, *i.e.*, a suit by the plaintiff claiming as a relief a decree for possession of the occupancy holding. By intruding himself into the suit, notwithstanding that there has been no amendment of the pleadings, Ganga Din must be taken to be maintaining his right, if any, under the mortgage and decree and his right to have possession of the occupancy holding. So far as Ganga Din is concerned, the suit must be regarded as a civil suit. By reason of s. 9 of Act XII of 1881 no right of occupancy passed to him, and consequently he could not, on the title alleged by him, be entitled to obtain or retain possession of the occupancy holding. If in possession, his possession, being without the consent of the plaintiff, would, so far as the plaintiff is concerned, be the possession

(1) I. L. R., 12 All., 419.

of a trespasser. He could obtain from Ishri no greater title than Ishri had. Ishri's title was that of an occupancy tenant who was not a tenant at fixed rates, and that title Ganga Din by reason of s. 9 could not obtain. He, consequently, as against the plaintiff, had no title to the possession of the occupancy holding, the plaintiff being the zamindár landlord. That disposes of the question of title, subject only to the question of limitation. Now s. 94 of Act XII of 1881 provides only for a limitation with regard to the suits dealt with by that Act, and it does not in this case, so far as this suit is one between the plaintiff zamindár and Ganga Din, the trespasser, supersede the provisions of the Indian limitation Act of 1877. So far as the suit between the plaintiff and Ganga Din is concerned, it happens that Ganga Din has intruded himself into a suit which was commenced in the Court of Revenue, but the suit as against him must be treated as a Civil suit. The question of jurisdiction is at this stage immaterial, because the appeal went before the District Judge, who had jurisdiction, whether the suit was commenced in the proper Court or not, *i.e.*, he had jurisdiction whether the suit was commenced in the Revenue Court or in the Civil Court. So far as Ganga Din is concerned, the limitation is that provided by the Indian Limitation Act of 1877, and the suit as against him is within time within that Act. The decree which we pass as against Ganga Din is that the appeal be allowed with costs, and that Ganga Din has, as against the plaintiff, obtained no title to the possession of the occupancy holding, and that the plaintiff do have possession of the occupancy holding as against Ganga Din. The decree below will stand so far as Ishri is concerned, *i.e.*, as a decree of dismissal.

Appeal allowed.

1892

SRI KISHEN
v.
ISHRI.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Mahmood and Mr. Justice Knox.

1892
January 23.

MUHAMMAD NAIM-UL-LAH KHAN (DEFENDANT) v. IHSAN-UL-LAH KHAN (PLAINTIFF).

Civil Procedure Code, ss. 206, 582, 588, 591—Letters Patent, North-Western Provinces, s. 10—Amendment of decree—Order of a Single Judge of the High Court amending an appellate decree—Appeal from such order.

Whether an order made by a single Judge of the High Court directing the amendment of a decree passed in appeal by a Division Bench of which he had been a member is an order made under s. 206 read with ss. 582 and 632 of the Code of Civil Procedure, or by virtue of the inherent power which the High Court has in the exercise of its appellate civil jurisdiction to amend its own decrees, it is one to which the provisions of Chapter XLIII of the Code of Civil Procedure are applicable, and from such order no appeal under s. 10 of the Letters Patent will lie, *Hurrikh Chunder Chowdhry v. Kalisunderi Debia* (1) discussed.

This was a reference made by Edge, C.J., and Straight, J., to a Bench of four Judges. The plaintiffs-appellants in the Letters Patent appeal out of which this reference arose, had brought a suit in the Court of the Subordinate Judge of Sahāranpur for the recovery of certain property detailed in schedules marked A, B, C, and D attached to their plaint. Before a defence was filed or issues framed the plaintiffs applied to be allowed to amend their plaint by making certain additions to the property detailed in schedules A and B. This application was granted, and a note was made in the plaint of the increase in the amount claimed; but the list of the property so added was inadvertently omitted to be attached to the plaint. The plaintiffs' suit was in part decreed and in part dismissed by the Subordinate Judge, and the plaintiffs in consequence appealed to the High Court. In that appeal a decree was passed by consent modifying the decree of the Court of first instance. Subsequently to the decision of that appeal the plaintiffs applied to the Court of first instance for amendment of its decree by inserting a detail of the property added on the petition for amendment of plaint, which application was granted.

(1) L. R., 10, I. A. 4; S. C. I. L. R., 9 Calc., 482.

From the order on that application, however, an appeal was preferred to the High Court by the defendants, and this appeal was decreed on the ground that after an appeal had been preferred and decided, the Court of first instance had no jurisdiction to pass any order under s. 206 of the Code of Civil Procedure. The plaintiffs, therefore, applied to the High Court for amendment of its decree in the manner previously prayed for in the Court of first instance. That application came before Tyrrell, J., as the remaining Judge of the Bench which had passed the decree, and was granted by him. From that order the defendants appealed under s. 10 of the Letters Patent, and on the appeal coming on for hearing the plaintiffs-respondents took a preliminary objection that the appeal did not lie.

1892
MUHAMMAD
NAIM-UL-
LAH KHAN
v.
IHSAN-UL-
LAH KHAN.

Pandit *Sunder Lal*, for the appellants.

The Hon. *G. T. Spankie* and Munshi *Ram Prasad*, for the respondents.

EDGE, C. J.—This Letters Patent appeal came on to be heard by a Bench of two Judges, when an objection was taken on behalf of the respondent to the appeal that no appeal lay. It was urged, on the other hand, that an appeal lay. The Bench was referred to a case decided by their Lordships of the Privy Council and to certain decisions of this Court and the High Court of Calcutta. Thereupon the question as to whether the appeal lay was referred to a Bench of four Judges.

The appeal was brought from an order of our brother Tyrrell by which he amended a decree of this Court on an appeal, so as to bring it into accordance with the judgment which had been delivered in the case. The Judges who were parties to that judgment were Sir Comer Petheram, the then Chief Justice of this Court, and our brother Tyrrell. At the time when the application to amend the decree was made, Sir Comer Petheram had ceased to be a member of this Court, and, following the usual practice of this Court, the application was heard by the Judge who was a party to the judgment, and was still a member of

1892 the Court, and he made the order which was questioned in this appeal.

MUHAMMAD
NAIM-UL-
LAH KHAN

^v
IHSAN-UL-
LAH KHAN.

The question which we have to decide depends upon the consideration of s. 10 of our Letters Patent, the statutes relating to the legislation powers of the Governor-General of India in Council, and of the Code of Civil Procedure, as amended. The Letters Patent applying to this Court were issued on the 11th June 1866, and consequently long prior to the Code of Civil Procedure with which we have to deal. It is not contested, and indeed it could not be, that the Governor-General in Council has power to make laws which this Court is bound to carry out and to observe. That is provided for by s. 22 of 24 and 25 Victoria, chapter 67, and by subsequent legislation, and that power of the Governor-General in Council is in terms reserved by s. 5 of our Letters Patent. The right of appeal is a right which is created by statute, or, as in this case, Letters Patent—the Letters Patent being an authority having the force of law. By s. 10 of those Letters Patent, so far as we need consider them in this case, a right of appeal to the Court from the judgment, not being a sentence or order passed or made in any criminal trial of one Judge of the Court, was given. The question is whether that right of appeal has been curtailed or limited by subsequent legislation of the Governor-General of India in Council. In my opinion the judgment referred to in s. 10 of the letters Patent is the express decision of a Judge of the Court which leads up to and originates an order or decree

Our brother Tyrrell, in making the order for the amendment of the appellate decree of this Court in the case, was acting in the exercise of the appellate jurisdiction of the Court, and, as I think, under s. 206 coupled with ss. 582 and 632 of the Code of Civil Procedure (Act No. XIV of 1882). It is true that the High Court of Bombay has held that s. 206 of the Code of Civil Procedure does not apply to a High Court on its original side or on its appellate side. That it does not apply to a High Court on its original side is manifest from s. 638, which excludes the application

of that section to a High Court in the exercise of its original civil jurisdiction. But, having regard to ss. 582 and 632, I must regard s. 206 as applicable to a High Court on its appellate side, as I regard those sections as practically extending to the appellate side of the Court the earlier provisions, so far as they are applicable to a High Court on its appellate side. It appears to me that if the Legislature had intended that s. 206 should not, so far as may be by reason of ss. 582 and 632, be applicable to a High Court on its appellate side, it would, when excluding by s. 638, s. 206 from application to a High Court on its original side, have likewise excluded the application of s. 206 to a High Court on its appellate side. I may be wrong in the effect which I attribute to ss. 582 and 632 of the Code of Civil Procedure, but I think I am correct in saying that it is the duty of the Legislature when dealing with procedure to lay down in specific and clear language what such procedure shall be, and not to leave Courts and litigants in doubt as to what it intends the procedure to be. Ss. 582, 587 and 647 of the Code of Civil Procedure are fair examples of a method of drafting an legislation which should be avoided, unless the Legislature desires to create confusion and uncertainty, and to leave it in doubt as to whether it or its advisers knew what was the procedure required.

It is not very material in the present case to decide whether s. 206 applies or not. If it does not apply, the Court which has to exercise appellate civil jurisdiction must have an inherent jurisdiction to bring its decrees into accordance with its judgments, and our brother Tyrrell in that event passed his order in the exercise of the appellate jurisdiction of the Court within the meaning of s. 591 of the Code. The question before us really turns on the effect of the sections contained in chapter XLIII of the Code of Civil Procedure. S. 588 of the Code commences by enacting—"an appeal shall lie from the following orders under this Code and from no other such orders." S. 591 provides that, "except as provided in this chapter no appeal shall lie from any order passed by any Court in the exercise of its original or appellate jurisdiction, but

1892

MUHAMMAD
NAIM-UL-
LAH KHAN
v
IHSAN-UL-
LAH KHAN.

1892 if any decree be appealed against, any error, defect or irregularity
 MUHAMMAD in any such order affecting the decision of the case may be set forth
 NAIM-UL as a ground of objection in the memorandum of appeal.”
 LAH KHAN.

v.
 IHSAN UL- In the case of *Hurriah Chunder Chowdhry v. Kali Sunderi*
 LAH KHAN. *Debia* (1), their Lordships of the Privy Council, at page 17, said:—
 “ It only remains to observe that their Lordships do not think that
 s. 588 of Act X of 1877, which has the effect of restricting certain
 appeals, applies to such a case as this where the appeal is from one
 of the Judges of the Court to the full Court. ” I have had occa-
 sion to comment on that decision, and to examine to the best of my
 ability its bearing, in the case of *Banno Bibi v. Mehdi Husain* (2).
 Whether the view which I then took of the meaning of their Lord-
 ships of the Privy Council was correct or not I am not now going to
 discuss. On looking again at that case it has struck me further that if
 Mr. Justice Pontifex in that case was acting or assuming to act under
 s. 244 of the then Code of Civil Procedure, an appeal undoubtedly lay.
 It is not necessary to consider whether he had any jurisdiction in
 that particular case to act under s. 244. It has also struck me that
 if he was not supposed to be acting under s. 244, then he must be
 supposed to have been acting under some power which he conceived
 he had under chapter XLV, which relates to appeals to Her Ma-
 jesty in Council, and this leads up to what I am now going to say.

It appears to me that the Code of Civil Procedure (Act No. XIV of 1882), as did Act No. X of 1877, contemplates a High Court in two aspects. It contemplates a High Court doing the ordinary work of a Court of original and appellate jurisdiction, having the necessary powers of review and revision in certain cases, and certain other powers such as are generally found vested in the Courts of the importance of High Courts. It also contemplates that the High Courts in India should, in certain matters relating to appeals to Her Majesty in Council, act for and on behalf of Her Majesty in Council, exercising powers more in the nature of ministerial powers than in the nature of judicial powers. Whatever those powers may be, it is quit clear to my mind that the powers

(1) L. R. 10 I. A. 4 ; I L. R., 9 Calc., 482.

(2) I. L. R. 11 All., 375.

conferred on a High Court under Chapter XLV of the Code of Civil Procedure are special powers and entirely distinct from the ordinary powers required by the High Court in the carrying on of its ordinary judicial business. It would be impossible to read Chapters XLIII and XLV together. If the sections contained in Chapter XLIII were to be applied to matters coming under Chapter XLV, that is, to matters arising in appeals to Her Majesty in Council, a difficulty would at once arise; for, although s. 588 limits appeals from orders under the Code to the orders specified in s. 588, we find on turning to Chapter XLV that, by ss. 601 and 611, for example, an appeal is given from certain orders made in India in cases falling under that chapter, and those orders are not orders which are included as orders from which an appeal may lie under s. 588. S. 611 provides a procedure by reference for the appeals from the orders referred to in that section. That section enacts:—"The orders made by the Court which enforces or executes the order of Her Majesty in Council, relating to such enforcement or execution, shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the enforcement or execution of its own decrees."

I have consequently come to the conclusion that Chapter XLIII cannot be applied to orders made in appeals in cases which are under appeal to Her Majesty in Council. If that view be correct, an appeal in the case which went to the Privy Council from the High Court of Calcutta would apparently have lain from the order of Mr. Justice Pontifex, whether he had or had not jurisdiction to make that order.

It may be said that there may be other matters in the Code of Civil Procedure—orders other than orders made in cases falling under Chapter XLV to which the sections in Chapter XLIII do not apply. It may be said, for instance, that they do not apply to an order made on an application for review of judgment under section 623. With regard to that, even assuming for a moment, I am not going to decide it, that Chapter XLIII does not apply at all to applications for review of judgment, we find that section

1892

MUHAMMAD
NAIM-UL-
LAH KHAN
v.
IHSAN-UL-
LAH KHAN.

1892
MUHAMMAD
NAIM-UL-
LAH KHAN
v.
IHSAN-UL-
LAH KHAN.

629 provides that where the Court makes an order rejecting the application that order shall be final, and where the Court admits the application, an immediate appeal is given by the same section against the order admitting the application. With regard to orders made in revision under section 622 of the Code of Civil Procedure (Act No. XIV of 1882), it appears to me that, whether Chapter XLIII of the Code applies or not, it could not have been contemplated by the Legislature that there should be any appeal against an order made under section 622 of the Code. Section 622 can only be applied by a High Court in cases in which no appeal lies to the High Court. It is a section which has been always treated and always considered, by this Court at any rate, as giving purely discretionary power to the High Court to interfere or not. It was a section which obviously was not intended to create or be the foundation of appeals in cases in which no appeal had lain, and, looking at the object of that section and the cases to which that section would apply, that is, cases in which no appeal lay to the High Court, I cannot believe that such an anomaly was intended as would exist if, from the orders passed under section 622 in revision, a party has a right of appeal when no appeal lay in the original case to this Court. However, to come back to the subject in hand, I do not think it necessary to refer to the other decisions which have been passed with regard to the rights of appeal under section 10 of our Letters Patent and the corresponding sections of the Letters Patent of other High Courts. They have frequently been referred to ; but I may confine myself to saying, in conclusion, that I think the order which was passed by our brother Tyrrell when he decided to amend the decree in the case, was an order from which an appeal is excluded by Chapter XLIII of the Code of Civil Procedure. It was an order passed by a Judge not on an appeal, but in the matter of an appeal in this Court, and in the exercise of the appellate jurisdiction of this Court.

I would answer this reference by saying that an appeal did not lie under section 10 of the Letters Patent from the order of our brother Tyrrell.

STRAIGHT, J.—I am entirely of the same opinion as the learned Chief Justice, and I have nothing to add.

1892

MUHAMMAD
NAIM-UL-
LAH KHAN
v.
JHSAN-UL-
LAH KHAN.

MAHMOOD, J.—This reference assumes significance, because I think, though limited to this particular order of my brother Tyrrell, dated the 21st December 1889, it raises, as the argument of the learned counsel for the parties has shown, some important questions of principle—important not only as questions of law, but also as questions relating to the practice of this Court and the practical working thereof.

It is in this view that I desire to deliver a separate judgment by saying as the first observation therein, that I agree in the conclusion arrived at and the answer given by the learned Chief Justice and my brother Straight to the question referred to the Full Bench.

That question is simply this :—Whether when a Judge of this Court, namely, a chartered High Court, acting under section 206 of the Code of Civil Procedure, as that section is rendered applicable by dint not only of section 582 of the Code in appeals but also by reason of s. 632 of the Code of Civil Procedure, makes an order, rightly wrongly, with jurisdiction, an order of that character is one which can be made the subject of an appeal under section 10 of the Letters Patent ?

It must be said, and indeed there can scarcely be any doubt, that section 22 of statute 24 and 25, Victoria, Chapter 67, usually called the India Councils Act, gives ample power to the Governor-General in Council to legislate for India, and those powers are so broad and extensive that they have quite recently been made the subject of consideration by the whole of this Court, where they were considered in the case of *Abdulla v. Mohan Gir* (1).

The next enactment is again an Act of Parliament, 24 and 25 Victoria, Chapter 104, wherein the powers of the Governor-General in Council to legislate for India, which were given to him under the earlier enactments, have been preserved.

(1) I. L. R. 11, All, 490.

1892

MUHAMMAD
NAIM-UL-
LAH KHAN
v.
IHSAN-UL-
LAH KHAN.

Next come the Letters Patent under which this Court has been established, and section 28, and more fully section 35 of those Letters Patent, not only preserve the power of the Governor-General in Council to legislate, but direct us as Her Majesty's Judges to abide by such legislation and carry out its mandates.

I have dwelt upon these preliminary matters in order to give the answer which I am going to give, and limiting it to the case now before me without expressing any opinion as to any other class of orders made by a Judge of this Court, either in the exercise of original civil or appellate jurisdiction. The order of my brother Tyrrell was undoubtedly made, as it seems to me, under section 206 of the Code. It is clear that an order such as that, when made by a Court in the Mofussil, is not appealable, because it is excluded by section 588 of the Code of Civil Procedure. It must be taken to be an unappealable order, and it was indeed upon this ground that in the two Full Bench cases referred to in the referring order, namely, the case of *Surtia v. Ganga* (1) and *Raghunath Das v. Raj Kumar* (2) where my judgments were upheld by the whole Court, the turning point was that an order under section 206 being an unappealable order can be made the subject of the visitatorial functions of this Court under section 622 of the Code of Civil Procedure. When these cases were before the Division Bench, I had the misfortune of differing upon this point, as to the non-appealability of the orders made under section 206, because, if those orders can be made appealable to this Court, this Court, under the express prohibition of section 622, had no power to interfere in revision.

If orders under s. 206, such as were concerned in the two cases referred to, when made either by Courts of original or appellate jurisdiction in the districts, are not appealable, it becomes necessary to investigate whether, as is contended by Pandit *Sundar Lal*, the order of my brother Tyrrell, which is now under consideration, is to be rendered appealable. The learned vakil has of course relied upon the solitary ground which he could urge, namely, the some-

(1) I. L. R. 7, All., 875.

(2) I. L. R. 7, All., 876.

what broad and general provisions of s. 10 of the Letters Patent, and he was quite within his rights when he contended that, whenever under the law a right of appeal is distinctly given, that right is not to be taken away, unless there is express legislation or authority which can abrogate the right so conferred. The proposition thus put is simply the converse of the other well-known rule, that no right of appeal exists unless it is given by statute, or by any other authority which would be binding upon the Court.

Whilst conceding the soundness of this part of the argument I hold, as the learned Chief Justice has explained, that the provisions of s. 10 of the Letters Patent have been so amply modified by the various provision, of the enactments passed by the Governor-General in Council under the authority of the Indian Councils Act, resulting in this last enactment, namely, the Code of Civil Procedure (Act No. XIV of 1882), that we are bound to take into account the provisions of that enactment and to refer back to s. 10 of the Letters Patent to see whether those general provisions have or have not been abrogated or modified.

I am of opinion that they have been modified, so far as the question arising in this case is concerned. S. 588 of the Code of Civil Procedure limits the right of appeal to a certain class of orders, and declares that none other than those contained within the four corners of that section are appealable. There are various other sections of the Code also which render decrees and orders non-appealable, and I may, by way of illustration, refer to the last part of s. 522 as to arbitration decrees and also to s. 325 of the Code of Civil Procedure, which is nearer in connection with the facts of this case, because here also a decree was passed upon a compromise.

To hold then that where this statute of ours, namely, our present Code of Civil Procedure, declares a decree or order non-appealable, such decree or order can be made the subject of consideration by the whole of this Court under the Letters Patent, is to hold that wherever no appeal lies to this Court the ceremony of presenting it to this Court to a single Judge of this Court, who

1892

MUHAMMAD
NAIM-UL-
LAH KHAN
v.
IHSAN-UL-
LAH KHAN.

1892
MUHAMMAD
NAIM-UL-
LAH KHAN
v.
IHSAN-UL-
LAH KHAN.

would undoubtedly reject the appeal, makes it the subject of consideration by a Bench of the Court. It seems to me that it would be defeating the whole policy of the statute as to the finality of decisions.

I refrain from referring to the various rulings which have been cited in the course of the argument. I am anxious to avoid referring to them, not only because it would lengthen my judgment, but also because, so far as my own view in this case is concerned, it proceeds upon what I have said, and it is independent of the *ratio* adopted in those cases.

To hold that an erroneous order passed by a Judge of this Court, whether in the exercise of original civil jurisdiction or in the exercise of appellate civil jurisdiction under s. 206, is non-appealable to the whole of this Court, may appear at first sight to be a hardship; but it is not so. This Court under the Code of Civil Procedure is the Court of highest appeal in this part of the country, and it is as such a Court, and in no other capacity, that it exercises its powers of revision such as those contemplated by s. 622 of the Code and s. 25 of the Provincial Small Cause Courts Act. These powers can be exercised only by a Court of higher jurisdiction than the Court which made the erroneous order within the meaning of those sections.

A Judge of this Court when acting erroneously under s. 206, may be so acting, but his action cannot be made subject of revisional jurisdiction by this Court, because that jurisdiction does not exist, any more than it exists in cases where an erroneous decree is passed by a Bench of two Judges, which decree, even if erroneous cannot be made the subject of appeal under s. 10 of the Letters Patent. The remedy, if any, lies by invoking the power of Her Majesty in Council as the higher tribunal. I think that to maintain that the whole of this Court has revisional jurisdiction upon a decree made by a Judge of this Court, is to hold that orders and decrees which are distinctly rendered final and non-appealable by the Code of Civil Procedure become non-final and appealable by dint of s. 10 of the Letters Patent.

I wish to add one more observation, and that is this: that in the two Full Bench cases to which I have referred, reported in the 7th volume of the Allahabad Reports, the point now under consideration was not raised, and also having carefully considered what was ruled by the learned Chief Justice and my brethren Straight and Tyrrell in *Naubat Ram v. Harnam Das* (1), and again by the learned Chief Justice and my brother Tyrrell in *Banno Bibi v. Mehdi Husain* (2), I consider that nothing which has fallen from his Lordships the Chief Justice to-day is inconsistent with the *ratio* upon which those cases proceeded, and those two rulings are wholly consistent with each other.

1892

MUHAMMAD
NAIM-UL-
LAH KHAN
v.
IHSAN-UL-
LAH KHAN.

My answer to the reference, therefore, is the same as that given by the learned Chief Justice.

KNOX, J.—In the case before us the prayer addressed to this Court was that the Court might be pleased to rectify a mistake which, it was alleged, had found its way into a decree passed by the Court on the 12th January 1886. My brother Tyrrell considered that the decree as framed needed amendment, and passed accordingly his order amending the decree so as to carry out the intention of the Court which passed that decree. There is nothing on the record, so far as I can see, which shows that this order made by him was an order passed under s. 206, as rendered applicable by ss. 582 and 632 of the Code of Civil Procedure. It may or may not have been so. I am satisfied that, independently of these sections, this Court has power to amend its decrees. I am not free from some doubts whether s. 206, or rather the last two paragraphs of it, were intended to apply to the appellate jurisdiction of Courts governed by the Code of Civil Procedure. At present I incline to the view that s. 579 was intended to be, so far as appeals are concerned, the correlative section to 206, which applies, at any rate primarily, to decrees in original suits, and was intended to be complete in itself. But from this standpoint also no appeal would lie from the order passed, as the order in any event was clearly made in the exercise of the appellate jurisdiction of the Court

(1) Weekly Notes, 1886 p. 37.

(2) I. L. R., 11 All., 375.

1892 within the meaning of s. 591 of the Code. I concur with the learned Chief Justice that the order passed by my brother Tyrrell when he decided to amend the decree, was an order from which an appeal was excluded by Chapter XLIII of the Code, and I therefore answer the reference in the terms given by him.

MUHAMMAD
NAIM-UL-
LAH KHAN
v.
ISHAN-UL-
LAH KHAN.

APPELLATE CIVIL.

Before Mr. Justice Tyrrell and Mr. Justice Knox.

1892
May 10. MADHO DAS (PLAINTIFF) v. RAM KISHEN AND OTHERS (DEFENDANTS).*

Mortgage, equitable—Deposit of title-deeds in Calcutta—Immoveable property in mofussil—Act IV of 1882 (Transfer of Property Act), s. 59.

It is not necessary to the validity of a mortgage by deposit of title-deeds under s. 59 of the Transfer of Property Act (IV of 1882) that the property to which the title-deeds relate should be situated within the limits of one of the towns where such mortgages are allowed.

Varden Seth Sam v. Luckpathy Royjee Lallah (1) and Manekji Framji v. Rustomji Naserwanji Mistry (2) referred to.

This was a suit brought in the Court of the Subordinate Judge of Mirzapur by one Madho Das, against Ram Kishen, an insolvent, and the official assignee for the recovery of a sum of Rs. 135,304-12-9 with interest, and, in default of payment, for sale of certain immoveable property of the first defendant's situated in Benares, Mirzapur and Gházipur. The suit was based on an alleged equitable mortgage said to have been entered into by the defendant Ram Kishen in February 1888, by deposit of the title-deeds relating to the property in suit with the plaintiff's firm in Calcutta. Ram Kishen did not defend the suit but the official assignee appeared and pleaded, *inter alia*, that the title-deeds in question were either never voluntarily delivered by the defendant Ram Kishen to the plaintiff, but were wrongfully obtained by him, or if they were voluntarily delivered, such delivery did not

* First appeal No. 138 of 1890 from a decree of W. T. Martin, Esq., District Judge of Mirzapur, dated the 9th April 1890.

(1) 9 Moo. I. A., 303.

(2) I. L. R., 14 Rom., 262.

take place until after Ram Kishen had been adjudicated an insolvent, and in either case their delivery could not operate to create a charge or interest in favour of the plaintiff. The suit was transferred to the Court of the District Judge of Mirzapur, and a further issue was added as to whether in any case a delivery of title-deeds in Calcutta could effectuate a valid mortgage of property in the North-Western Provinces. The District Judge, holding on the main issue in the case that the deposit of title-deeds with the plaintiff or his agents in Calcutta in February 1888, was not proved, dismissed the plaintiff's claim. The plaintiff thereupon appealed to the High Court.

1892

MADHO DAS
v.
RAM KISHEN

Munshi *Madho Prasad* and Munshi *Jwala Prasad*, for the appellant.

The Hon. *G. T. Spankie*, Mr. *A. Strachey* and Mr. *Greenway*, for the respondents.

TYRRELL and KNOX, JJ.—We come now to the legal arguments on which the decree dismissing the suit was supported. Mr. *Strachey*, on behalf of the respondent, contended that the provisions of the third paragraph of s. 59 of the Transfer of Property Act, 1882, do not apply to a case, where, as in the present, the immoveable property covered by the title-deeds is situate beyond the towns of Calcutta, Madras, Bombay, Karachi and Rangoon. The clause in question, he pressed upon us, was a saving and not an enacting clause. He allowed that the only recorded precedent which he could find on this question was against him. The case was one heard by the Sadar Diwani Adalat at Madras. That Court, it is true, refused to enforce a lien against property situate beyond the town of Madras, of which property the title-deeds had been deposited as a security for a loan by parties living and contracting within the local limits of the Supreme Court of Madras. The principle which guided them to the refusal was that "such a transaction was not recognized" in Indian law, and they held that the principle of the English law applicable to a similar state of circumstances ought not to govern their decision. But this decision did not approve itself to their Lordships of the

1892 Privy Council who reserved the decision, on the ground that the
 MADHO DAS transaction was not one forbidden by law, and not being so
 v. forbidden, to refuse recognition was in the case before them a
 RAM KISHEN violation of justice, equity and good conscience. The case will be
 found reported in 9 Moo. I. A. at p. 307 and is known as the case
 of *Varden Seth Sam v. Lukpathy Royjee Lal'ah*. The learned
 counsel in dealing with this ruling laid great stress upon the fact
 that when the contract then under consideration was entered into,
viz., in the year 1851, there was no special law governing the
 transfer of immoveable property and no law requiring transactions
 affecting it to be registered. He maintained that this fact had led
 their Lordships to the decision at which they arrived, and that it
 might be fairly argued that if there had been in existence then, as
 now, laws regulating the transfer of property and the compulsory
 registration of mortgages affecting immoveable property, their Lord-
 ships would have given effect to the law and not have arrived at a
 contrary conclusion, regard being had to the saving clause contained
 in s. 59.

Positive local law now exists enacting how such contracts can
 and should be made, and it is a matter of public policy that the
 provisions of that law should be maintained and enforced. It would
 now be against justice, equity and good conscience to give effect to
 a mortgage which violated all registration rules and virtually
 defeated the provisions of the law. In short, a decision validating
 such a transaction is "opposed to the policy of the Registration
 Law; it would lead to evasion of stamp duty, and it is at variance
 with the principle of making the system of transferring land, as far
 as possible, a system of public transfer." This was the substance
 of Mr. *Strachey's* contention.

Now, it seems clear and patent to us, from the precise and posi-
 tive language contained in s. 59 of the Act, that the Legislature
 was not only aware of transactions of the kind with which we are
 dealing, but proceeded of set deliberation to recognize the practice
 and to accord to it the full sanction of law. There is in the section
 not one word which forbids effect to be given to an agreement

whereby parties express their intention to create a lien on immoveable property by a mere deposit of the title-deeds as security. Moreover, it seems to us that the question where the property affected may be situate is not a matter which should affect our decision. Had it been the intention of the law that transactions of this kind should only affect immoveable property situate within the narrow circle of the Presidency Town, nothing would have been easier than to give expression to such an intention. We find nothing in the Transfer of Property Act or in the Registration Act of 1877 which forbids such a transaction. It was beyond all doubt the intention of the contracting parties in February 1888, that the deposit should operate as a hypothecation or pledge, and it would be a violation of justice and equity under such circumstances to refuse to give effect to it. As regards the rest of Mr. *Strachey's* contention, it seems to us that no greater violence is done to the Registration Law in giving effect to an equitable mortgage in respect of property in Benares than in respect of similar property in Calcutta. Our attention was directed by Mr. *Banerji*, who appeared for the appellant, to the case of *Manekji Framji v. Rustomji Naserwanji Mistry* (1) in which upon another question the Bombay High Court recognized a deposit in the town of Bombay of title-deeds affecting property situate outside the limits of that Presidency Town as effecting a legal mortgage falling within the provisions of s. 59 of Act IV of 1882.

This case is valuable as showing that the deposit of title-deeds of property lying outside a Presidency Town operating as a legal mortgage is recognized and given effect to in Presidency Towns. We are, therefore, unable to accede to Mr. *Strachey's* contention, and we agree with the decision at which the lower Court arrived when dealing with this point.

The suit and the appeal are decreed with costs in both the Courts.

Appeal allowed.

APPELLATE CRIMINAL.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell, and
Mr. Justice Knox.*

QUEEN-EMPRESS v. HARGOBIND SINGH AND OTHERS.

1892

June 7.

*Criminal Procedure Code, ss. 342, 366, 367 and 540—Sessions trial—
Accused person, examination of—Witnesses, treatment of by Court—Order
of examination—Judgment—Sentence.*

Questions put by the Court to an accused person under the provisions of s. 342 of the Code of Criminal Procedure, 1882, must be strictly limited to the purpose described in that section, *i.e.*, "of enabling the accused to explain any circumstances appearing in the evidence against him." The evidence referred to in that section is the evidence already given at the trial at the time when the Court puts questions to the accused.

It is not intended by s. 540 of the Code of Criminal Procedure, 1882, that a Judge shall reverse the order of a Sessions trial and call the witnesses summoned for the defence before the case for the prosecution is closed.

It is illegal on the part of a Court to threaten witnesses with the penalties of the law unless they are evidently giving wilfully false evidence or persistently refusing to give evidence of facts which must be within their knowledge.

A sentence which has been passed or a direction that an accused be set at liberty which has been given at a Sessions trial before the judgment required by s. 367 of the Code of Criminal Procedure, 1882, has been written is illegal.

THE facts of this case are sufficiently stated in the judgment of the Court.

Mr. W. M. Colvin, Mr. J. E. Howard, Mr. T. Conlan, Mr. A. Strachey and Mr. R. Malcomson, for the appellants.

The Public Prosecutor (the Hon. G. T. Spankie), for the Crown.

EDGE, C. J. (TYRRELL and KNOX, JJ., concurring).—Hargobind Singh, Rajwant Singh, Buddhu, and Jhulai were, on the 21st of January 1892, found guilty of the murder of one Sambhal Singh, and sentenced to death by the Sessions Judge of Benares. They appealed, and their appeal was heard by us on the 2nd, 3rd and 4th of this month. On the hearing of the appeal Mr. Spankie, Public Prosecutor, appeared for the Crown, and Mr. Strachey for the appellants. The main grounds upon which we were asked to reverse the findings of the Sessions Judge were that,

on the evidence on the record, the appellants were entitled to be acquitted; that the Sessions Judge had during the course of the trial committed such illegalities and irregularities as rendered the trial bad; and that his conduct of the trial was such as precluded a fair trial of the appellants, and would, in case of a new trial being ordered, seriously damnify the appellants. It was further alleged on behalf of the appellants that, at the time when sentence of death was passed upon them, no written judgment was in existence, and that the written judgment which now accompanies the record, although signed by the Sessions Judge and bearing date the 21st of January 1892, was not written until after that date. It is hardly necessary to say that when a person is convicted of an offence under the Indian Penal Code and has a right of appeal to a High Court, and exercises that right of appeal, he is entitled to allege, and in the best way he can to prove, that there was no valid trial according to law; that the Judge who tried him acted illegally and with material irregularity in the course of the trial; that the Judge by his conduct of the trial precluded a fair trial being had; that the Judge in passing sentence had acted in violation of sections 366 and 367 of the Code of Criminal Procedure, 1882; and that at the time when such sentence was passed there was no record as required by law of the conviction which must precede and be the justification for the sentence. Further, it need hardly be said that when such serious allegations are *bona fide* raised by an appellant in a High Court, it is the duty of the High Court to consider them, and however unpleasant it may be for the Sessions Judge or for the Judges hearing the appeal, it is the duty of the Judges who have to decide the appeal to express their opinions as to the correctness or otherwise of those allegations and as to the effect of them, if substantiated, on the case. When in an appeal, whether it be in a civil or in a criminal case, it appears to the Judges of a High Court that the Judge of a Court subordinate to the High Court has acted illegally or irregularly in the case under appeal, it is their duty, not only to the appellant in the particular case, but in the interests of the Government and of the public, to speak plainly and to point out in what manner the provisions of the law have

1892

QUEEN-
EMPERESS
v.
HARGOBIND
SINGH.

1892

QUEEN-
EMPRESS
v
HARGOBIND
SINGH

been violated and its requirements disregarded. It is of greater moment to the Government and the public, if possible, than to one accused of a crime, that criminal trials should be conducted regularly, decorously, and in accordance with law and statutory procedure, and that no ground for doubting the competency or the impartiality of the Judiciary should be afforded by a departure on the part of a Sessions Judge or a Magistrate from the rules of law or the rules of procedure, which, as a Judicial Officer, he is bound to follow, or by a High Court passing over in silence and without comment such departures when they are material. High Courts are responsible for the due administration of the law by the Courts subordinate to them, the duty of superintendence having been imposed upon them by their Letters Patent. Indeed, the Government of India in one well-known case claimed the right to rebuke a High Court for the non-performance, as it appeared to the Government of India, of that duty of superintendence. It is necessary in this case to consider not only the evidence on the record, but the circumstances under which that evidence was recorded at the Session-trial, and the most material of the alleged illegalities and irregularities connected with the trial.

There are in this case four persons who say that they saw committed the murder of which these appellants have been convicted. The most material of those four witnesses was Amir Singh, who was a brother of Sambhal Singh, who was alleged to have been murdered by these appellants at the instigation of one of the zamindárs of the village in which Amir Singh and Sambhal Singh had been tenants, and of which many years ago their family had been the zamindárs. Not only as a witness for the prosecution was Amir Singh of great importance, but his due and regular examination and cross-examination were of almost vital importance to the defence, as the case for the defence was that Amir Singh, and not the accused, was the person who had killed Sambhal Singh, and that Amir Singh had murdered his brother with the object of making a false charge of murder against the zamindárs and their servants. The accused alleged that the case for the prosecution was what is known in

that part and the adjoining part of these Provinces as a *sesurimugadama*, of which each of us have had examples before us before now, examples, if this be one, as revolting as the present case.

1892

QUEEN-
EMPRESS

v.

HARGOBIND
SINGH.

The accused men when before the committing Magistrate had not given him a list of witnesses whom they wished to have summoned on their behalf for the Sessions trial. Each of the four accused had, in answer to a question put by the committing Magistrate, stated that he would file a list of witnesses. The committing Magistrate had not cross-examined the accused as to the names of their intended witnesses or as to what those witnesses would be called to prove. Each of the accused had, in his statement which was recorded by the committing Magistrate under section 264 of the Code of Criminal Procedure, 1882, clearly indicated what his defence was and would be. In our opinion, the committing Magistrate acted with sound judicial judgment and in accordance with law. The committing Magistrate would not, in our opinion, have been justified, either in law or in common fairness, in forcing the accused to disclose either the names of their intended witnesses or what those witnesses would be called to prove. An accused is entitled when before a committing Magistrate to reserve his defence and to refuse to disclose the names of the witnesses whom he intends to call at the Sessions trial. We say this not only because the omission of the committing Magistrate to break the law in these respects has been made by the Sessions Judge the occasion and the theme of severe comments upon the Magistrate and his general conduct of the case when it was before him—comments which, in our opinion, were entirely unjustified and uncalled for—but because that omission of the committing Magistrate has been made by the Sessions Judge the pretext for procedure on his part which, in our experience, is unprecedented in modern times in any part of Her Majesty's dominions, and was entirely illegal.

A list of witnesses for the defence was, subsequently to the committal, filed in the Magistrate's Court. On the 22nd or 23rd of December 1891, the Vakil for the accused presented to the Court of the Sessions Judge a petition, asking that 11 persons therein

1892
QUEEN-
EMPRESS
v.
HARGOBIND
SINGH.

named should be summoned as witnesses for the defence. The prayer of that petition was complied with, and the persons named in the petition were summoned as witnesses for the defence.

The Sessions trial commenced on the 6th of January 1892.

The accused had been committed for trial on charges under sections 304 and 148 of the Indian Penal Code. To those charges they pleaded not guilty. We may here state that a great deal of evidence was produced at the trial, tending to show that it was probable that there was no good feeling between the zamíndárs and the family of Sambhal Singh. With such evidence the record was overloaded. If there was much oppression on the part of the zamíndárs, it was as likely to have been the cause of the murder alleged by the defence as of that alleged by the prosecution. The first witness called was Amir Singh. He spoke to the connection of his family with the village; to alleged acts of oppression on the part of the zamíndárs; to alleged false charges brought against him or members of his family by the zamíndárs or their servants, including the accused, Hargobind; to the connection of the accused with the zamíndárs and the village, but did not on the 6th of January utter one word to connect the accused with the crimes with which they were charged, nor did he on the 6th of January give any evidence that a crime had been committed. The sole allusion in his evidence on that day to the death of Sambhal Singh was contained in the following sentence: "My brother, Sambhal Singh, was killed on the 13th of September." At the end of the record of the evidence given by Amir Singh on the 6th of January there is the following: "(Note.—Further examination of this witness deferred, as he is tired of standing.)" Whether Amir Singh was or was not tired of standing, the interests of justice required that his examination, cross-examination, and re-examination should be completed before any other evidence as to what had occurred on the 13th of September 1891 was taken on one side or the other.

The next witness called was Muhammad Zahur, a constable who had been employed as a writer in the office of the District Superin-

tendent of Police at Benares. He produced a petition which, on the 5th of September 1891, had been presented on behalf of the zamíndárs of the village. That petition is of such importance that we give the translation of it *in extenso*. The translation is as follows :—

1892

QUEEN-
EMPRESS
v.
HARGOBIND
SINGH.

“The petitioner begs to state that all the three brothers, Amir Singh, Sambhal Singh, and Har Narayan Singh, residents of mauza Gaharwarpur, police station Baragaon, are very turbulent and quarrelsome persons, and that Amir Singh has been punished for criminal offences on several occasions; but still they do not cease to do wrong and mischief. Owing to their failure to make payment, their entire property, cultivatory lands, mills, trees, bamboo clumps, and dwelling houses with *dálán*, &c., have been got sold at auction in execution of decree. On the 10th August 1891 Amir Singh was fined Rs. 20 by the Criminal Court on a charge of trespass and mischief. The petitioners are now going to remove the mill sold at auction; but there is a strong apprehension on their part of the recurrence of riot and quarrel. Moreover, the aforesaid persons threatened and said that they would beat Sambhal Singh, who is a very old man, and will get the zamíndár and his karinda implicated, and it is likely that they will commit the offence. Therefore it is prayed that an order may be sent to the officials of the police station of Baragaon, directing them to prevent the commission of the offence of riot and quarrel.” By that petition the zamíndárs, eight days before Sambhal Singh was killed, informed the police that they had heard that a *sesari-muqadama* would be got up against them and their karinda. Muhammad Zahur proved that he had put the petition at once before the Assistant Superintendent of Police, whose order was: “Order—That if there was fear of violence, to put a stop to it.” Muhammad Zahur stated that the papers were posted the same day to the Sub-Inspector at Baragaon. The petition was accompanied by a Mukhtárnáma purporting to be signed by the zamíndárs. The Sessions Judge having heard the evidence above-mentioned of Amir Singh and of Muhammad Zahur, and having read the petition, Mukhtárnáma, and order of the Assistant Superin-

1892

QUEEN-
EMPRESS
".
HARGOBIND
SINGH.

tendent of Police, framed a charge against the accused of wilful murder, under section 302 of the Indian Penal Code, and read and explained that charge to the four accused. To that charge they pleaded "not guilty."

The next witness called was Jawahir Lal, head constable, who, on the 13th of September 1891, was in charge of the Harahua outpost of the Baragaon police station. His evidence showed that Gaharwarpur, the village where the murder is said to have been committed, was distant about two miles from his outpost. His evidence is distinctly favourable to the defence. He proved that at seven o'clock on the morning of the 13th September Hargobind Singh, who is said by the prosecution to have taken an active part in the murder, came to the outpost at Harahua with one Bhukan Das, and asked him (Jawahir Lal) to go with them to Gaharwarpur, as their men were assembled and they were going to remove the mill. Jawahir Lal refused to go, as he had not got any orders. Hargobind Singh and Bhukan Das told Jawahir Lal that they had presented a petition for police assistance, and therefore expected him to go with them. Hargobind Singh and Bhukan Das left the outpost of Harahua, according to Jawahir Lal, by 7-30 A.M., and at 8 A.M., or rather before than after 8 A.M., Pryag Singh, the son of Sambhal Singh, came to the outpost and reported that a scene of violence had occurred and that his father had been killed. Jawahir Lal went at once to Gaharwarpur with Pryag Singh, and on the road met Bahadur Singh and the accused, Rajwant Singh. Pryag Singh told him (Jawahir Lal) who the two men were. Jawahir Lal told the two men to go with him, as Pryag Singh was complaining of them. When passing Karoma, Jawahir Lal directed the two men to stay at the Karoma *chhaoni* until he should send for them, and they obeyed his orders. Jawahir Lal went on to Gaharwarpur, and when he arrived there it was near nine o'clock A.M. At Gaharwarpur Jawahir Lal found Amir Singh standing by the corpse of Sambhal Singh. There was dead silence in the village, and although the village contained about one hundred inhabitants, not a man, excepting Amir Singh, was to be seen there. At this period of the trial an Inspector

of Police named Bhairo Shankar and a head constable named Bija Narayan Singh were interposed to produce and prove a plan of Caharwarpur ; and then Jawahir Lal was recalled and examined on the plan and as to the position of the corpse, some signs of digging, the beginning of the construction of an embankment, the condition and position of a cane-press, the position of a sugar-boiling house, of the buildings of the deceased man, of a mango grove and a well, and as to whether the construction of the embankment would not interfere with a footway from the houses and with the access to the well, and such like matter. Jawahir Lal said : " I found Sambhal Singh quite dead. I should say from the appearance that he had been dead an hour or an hour and a-half. The blood had ceased to flow. The blood had flowed from four or five wounds. On the ground there was a clot of blood about the size of the palm of a man's hand."

1892

 QUEEN-
 EMPRESS
 "v"
 HARGOBIND
 SINGH.

Jawahir Lal's evidence above referred to closed the evidence which was recorded on the 6th of January. Beyond the fact that Jawahir Lal had stated that when he met Bahadur Singh and the accused, Rajwant Singh, between eight and nine o'clock on the morning of the 12th of September, he told them to go with him, " as Pryag was complaining of them," there was not one word of evidence given on the 6th of January connecting the accused men, or any of them, with the crime. At the close of the evidence on the 6th of January the Sessions Judge made an order, the only material part of which was " arrangements to be made to keep the accused apart until they are examined."

On the morning of the 7th of January the trial was resumed. The part of the record relating to that day begins thus :—

" Trial resumed. Present as before. Read and heard application of the Government Pleader to examine all the defence witnesses as witnesses for the Crown, as the Deputy Magistrate has omitted to question them, though they are (more or less) summoned to prove that Sambhal Singh was murdered by men who are witnesses for the Crown.

" Application refused. At the earliest possible moment the Court will examine the accused and then, if necessary, proceed

1892
 QUEEN-
 EMPRESS
 v.
 HARGOBIND
 SINGH.

under section 540, Criminal Procedure Code. Amir Singh, recalled, re-sworn, states : ' My brother, Sambhal Singh, was knocked down in my sight by *lathi* blows, and died on the spot by the embankment which was being made some five or seven cubits westward from the *charri* or feeding-troughs. I saw the blows struck. The first blow was struck by Bahadur Singh : this did not knock him down. He was then simultaneously struck by Rajwant Singh, Jhulai Ahir, Buddhu Koeri, and Hargobind Singh. Each one struck him with a *lathi*. There were some 15 or 20 other men there armed with *lathis*, all ready to fight on the side to which Bahadur Singh was allied."

Then the Sessions Judge makes an order that the prisoners be examined.

It is now necessary to refer to the petition which had been presented by the Government Pleader. We have above set out what the Judge's record of that morning states concerning it. Let us now turn to the judgment. Speaking of the case for the defence, the Sessions Judge in his judgment says :—

" Assuming for a moment, for the sake of argument only, that this countercharge be false, then a more heinous and revolting attempt to procure judicial murders cannot be conceived by man.

" Extermination by the halter is meant.

" A Magistrate invested with first class powers, one whose whole life has been passed in this land of intrigue and perjury, has been content to pass on this most dangerous case without taking the precaution of reducing to writing what could be said against the theory he adopted. He left it open to one side to produce men in relays tutored to say whatever might be deemed expedient to cause to be said. When examining the two accused, Rajwant and Jhulai, he did not take the trouble to insist on their saying who else besides themselves could have seen the murder of one brother at the hand of another. When committing the four prisoners, he again neglected his most important duty by allowing them to reserve the names of their witnesses. Lists were subsequently filed ; but then, again, it was

left open to the friends of the prisoners to utilize each man so named in any way which might thereafter be deemed expedient. In other words, the Magistrate neglected—culpably neglected—to insist on a specification of the nature and scope of the expected evidence of each witness then named.

1892

QUEEN-
EMPRESS
v.
HARGOBIND
SINGH.

“Worse was to follow. After the records came into this Court, those then concerned with the defence found means to have substituted lists of witnesses brought on to the record, so that, when the trial in this Court commenced, the prosecution had no knowledge of the names of many of the witnesses who were attending to rebut the evidence for the prosecution; and among the additional witnesses secretly added are two avowed eye-witnesses of the murder of Sambhal Singh by the members of his own family,—the chief witnesses for the prosecution.

“This culpable neglect of duty by the committing Magistrate has added vastly to the labour of the Court—to its difficulties,—and has placed the Judge in a most invidious position. At the earliest possible stage, after discovering what had been done, the Government Pleader applied to have all the witnesses for the defence-made witnesses for the Crown. This was refused; but as it would have been at the risk of a fearful miscarriage of justice to allow tutors of false witnesses a chance of instructing willing pupils to swear away the lives of men sent up as witnesses for the prosecution; and as, on the other hand, the statements of these men, supposing they had been telling a true story, would have had very little weight if their examination were delayed, the statements of all those likely to be able to give evidence outside of those sent up as Crown witnesses were recorded as quickly as possible.”

Entertaining grave doubts as to the *bona fides* of that petition of the Government Pleader, we asked him, whilst this appeal was being heard, under what section of the Code of Criminal Procedure he had presented it. He said he did not know. We asked him if he had ever presented any similar petition before, and he said he had not. We then asked him to explain the circumstances under which he came to present it. His explanation was as follows: According

1892
QUEEN-
EMPRESS
v.
HARGOBIND
SINGH.

to him, when he went to the table of the Sessions Judge at the close of the evidence on the evening of the 6th of January, to get his certificate of attendance signed, the Sessions Judge told him to put in a petition asking that the witnesses for the defence should be examined for the Crown, on the ground that the committing Magistrate had not fully taken down the statements of the accused. The Government Pleader stated that he did not then draw up the petition, and that when, on the following morning, the 7th of January, the Sessions Judge asked him if the petition was ready, he said it was not, as he did not know under what law he was to present it, and thereupon the Sessions Judge said to him that it was not under any particular law, but he was to file it for the ends of justice; and he then went and drew it up at once and presented it, and the Sessions Judge rejected it. We asked the Government Pleader if it was *bona fide* intended by him to make the witnesses for the defence witnesses for the Crown—that is, witnesses whose evidence the Crown intended to accept—and he said it was not *bona fide* intended to make those witnesses witnesses for the Crown. Such was the account given to us by the Government Pleader. Forming our opinion from the record of the trial as to the conduct of the trial by the Sessions Judge and as to his bias, we see no reason to doubt that the statements of the Government Pleader may be accepted as correct. If they are correct, they show an unwarranted interference by the Sessions Judge with the conduct of the prosecution, which should have been left in the hands of the Government Pleader who had been instructed to conduct it, and further show that the least that can be said is that the opening passages from the Judge's record of the 7th of January and the extract relating to the petition which we have given from his judgment are the reverse of candid. That it was never intended *bona fide* to make the witnesses for the defence witnesses for the Crown he have not a doubt.

Whoever instigated the presenting of that petition, the object, beyond doubt, was to reverse the order of a criminal trial and to place the accused men at a disadvantage by having their witnesses

called and all that they could say disclosed before the evidence of Amir Singh should be completed or the other genuine Crown witnesses should be called. By such a course Amir Singh and the other witnesses for the Crown would be put upon their guard, and any cross-examination which could be administered to them would be practically futile. Such a course would be the last which any sane man who hoped to ascertain the truth and had not already made up his mind that the accused were guilty, and that nothing was to be said or believed in their defence, would adopt. And yet that course, but in another form, was adopted by the Sessions Judge.

After the evidence which we have quoted from the Judge's record had been given by Amir Singh on the morning of the 7th of January, the Sessions Judge ordered that the prisoners should be examined, and he proceeded to examine them accordingly. We asked Mr. Spankie under what section of the Code of Criminal Procedure the Judge was justified in examining the accused at that stage of the trial, and the only section he could suggest was section 342. That section, so far as it is material for present purposes, is as follows: "For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial, without previously warning the accused, put such question to him as the Court considers necessary, and shall for the purpose aforesaid question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence." It requires no knowledge of law to understand that section, and to understand that it is not for the purpose of ascertaining what witnesses the accused intends to call, or what evidence they will give, or what his defence is, that a Court is justified or authorized in examining an accused under that section. A Court is only authorized under section 342 to examine an accused "for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him." The evidence in that section referred to is the evidence already then given at the trial.

1892

QUEEN-
EMPRESS
v
HARGOBIND
SINGH.

1892

QUEEN-
EMPRESS
v.
HARGOBIND
SINGH.

At that stage of the trial the Sessions Judge put 21 questions to Hargobind Singh, 28 questions to Rajwant Singh, 22 questions to Buddhu Koeri, and 24 questions to Jhulai. The direct and only object of those questions was to get from the accused by a species of cross-examination the names of their witnesses, what evidence those witnesses would be called to give, what means of knowledge of the facts those witnesses had, and the particulars of the defence of each of the accused. We doubt, looking at those questions from a point of view most favourable to the Sessions Judge, if there was one single question of those 95 questions which was authorized by section 342, or was in any way directed towards enabling any of the accused "to explain any circumstances appearing in the evidence against him." Here are some examples. Amongst other questions the following were put by the Sessions Judge to Hargobind Singh :—

"Q.—To what point is Badal, Gadaria, your witness?"

"Q.—On which side of the road did you come across with Badal, Gadaria?"

"Q.—Strain your memory and tell anything more besides this that the Gadaria, Badal, may have said to you."

Here are some of the questions put to, and the answers given by, Rajwant Singh:—

"Q.—Who are the witnesses in your defence? Name them.

A.—Chhotu Chamár, Panchu Chamar, Phulman Chamar, Sukhdeo Pande, and Sheonandan Pande—altogether five persons. These are my witnesses, and no other besides them.

"Q.—Do you know whether Kuar Singh is included in the list of your witnesses or not? A.—I do not know, as I was in custody.

"Q.—What can Kuar Singh say in your defence? A.—I don't know what deposition he will give.

"Q.—Did you see Kuar Singh on the spot? A.—No, I did not see him on the spot, but on the day of this occurrence I saw him in his juar field.

"Q.—Why did you not get Kuar Singh summoned in your defence? No answer." 1892

Here are a few examples from the examination of Jhulai :—

"Q.—Were there any others who could see Amir Singh, &c., striking Sambhal Singh or not? If there were, name them.

A.—I don't think any one else saw the affair besides those whose names I have already mentioned.

"Q.—Now state again fully the whole affair as you saw it."

We have no hesitation in saying that that procedure and those questions were entirely illegal. The Sessions Judge, having got all the information he could from the accused as to their witnesses, proceeded to call and examine the witnesses for the defence. We should here say that the Sessions Judge had given the witnesses for the defence into the custody of the police. This is his euphemistic account of that proceeding. "The fact is, it would seem, that the action of the Court on the second day of the trial in suddenly putting every witness available for the defence under surveillance till he had declared what he had to say came as a total surprise on witnesses not yet prepared to say their say."

Avoiding euphemism, we should say that the Sessions Judge had been guilty of what is commonly known as wrongful restraint. This is what he did: he picketed the witnesses for the defence in twos in custody of the police, each two men being placed back to back, so that there might be no communication between them. Much as the witnesses may have been surprised by that action of the Sessions Judge, there was a still greater surprise in store for them.

Immediately after the accused had been examined in the manner referred to, the Sessions Judge proceeded to call the witnesses for the defence and to examine them. It is alleged on behalf of the appellants that the Sessions Judge, as each of the witnesses for the defence was called, or shortly after his examination commenced, caused section 194 of the Indian Penal Code to be read to the witness. Referring to the witnesses for the defence,

QUEEN-
EMPRESS
v.
HARGOBIND
SINGH.

1892 this is what the Sessions Judge says on the subject in his judgment :—

QUEEN-
EMPRESS
v.
HARGOBIND
SINGH. “However, what they have deposed has been declared by them with a full knowledge of the provisions of section 194, Indian Penal Code.”

The record of the evidence of the first seven witnesses for the defence who were examined by the Sessions Judge shows that the attention of six out of the seven must have been drawn to section 194 of the Indian Penal Code, and that they misunderstood that section. Their evidence shows that as they were aware that Amir Singh was accused of having killed his brother, Sambhal Singh, they considered that they might be transported for life if they gave false evidence at the trial of Hargobind Singh, Rajwant Singh, Buddhu, and Jhulai in their favour. The fact is that the section was entirely inapplicable to the witnesses, unless they gave false evidence at the trial, intending thereby to cause, or knowing it to be likely that they would thereby cause, these four appellants, or some or one of them, to be convicted of the murder with which they were charged. The Sessions Judge could not have imagined that the witnesses for the defence were likely to give false evidence against the four accused or any of them. The only event in which section 194 could possibly have applied to them was the event of the action of the Sessions Judge so far intimidating the witnesses as to induce them to give false evidence against the accused. The witnesses for the defence may be excused for not knowing the law when it is apparent that the Judge himself was ignorant on the subject.

We have no hesitation in saying that it is illegal of a Judge to threaten a witness with the penalties of the law, and that no Judge should allow anything of the nature of a threat to be administered to a witness, unless and until the witness has shown by his evidence that he is wilfully saying what is false or is persistently refusing to give evidence on facts which must be within his knowledge. To threaten witnesses for the defence of a man who is on his trial for his life is to deny him a chance of proving his innocence, and is, in

our experience, before this present case, unheard of on the part of a Judge. It is easy to conceive what must have been the effect on any but the stoutest witness of what had happened and was happening. There could not have been any official, pleader or witness, about the Sessions Judge's Court, attending to what was going on, who could have doubted on the 7th of January that the Sessions Judge had made up his mind that the accused were guilty, and that their case was false.

1892

QUEEN-
EMPRESSv.
HARGOBIND
SINGH.

The Sessions Judge had administered at that early stage of the case an illegal and inquisitorial cross-examination to the prisoners. He had picketed all the witnesses available for the defence in twos in custody of policemen. He was making use of section 540 of the Code of Criminal Procedure in a way in which that section was never intended to be used. He was reversing the ordinary and legal course of a criminal trial. He was acting in violation of the spirit, if not of the letter, of sections 289 and 290 of the Code of Criminal Procedure, and he was beginning the examination of the witnesses for the defence by what must have seemed to them a threat of transportation for life if they should say in their evidence that it was Amir Singh, and not the prisoners, who had murdered Sambhal Singh; and yet the issue which the Sessions Judge had to try was, did the prisoners, or some or one of them, murder Sambhal Singh; and at that period of the trial the only direct evidence which had been given connecting the prisoners, or any of them, with the murder had been the evidence of Amir Singh, who himself was accused by the defence of the murder, whose evidence in chief had not been concluded, and who had not then been submitted to cross-examination.

What we have already pointed out would make it impossible for us to consider the trial a judicial one, or to allow the conviction of these appellants by the Sessions Judge to stand.

There are, however, other matters connected with the conduct of that trial by the Sessions Judge which we should be failing in our duty if we were to pass over in silence. The calling and examination by the Sessions Judge of the witnesses for the defence

1892
 QUEEN-
 EMPRESS
 v.
 HARGOBIND
 SINGH.

proceeded under the conditions to which we have referred. On the 8th of January the prisoner, Hargobind Singh, was further examined. He admitted that he had caused the petition of the 5th of September 1891 to be drawn up and presented to the police, and then the following question and answer are recorded by the Sessions Judge.—

“Q.—When you stood in the dock before the trial had fully begun, when the inquiry was made as to what class of Rajputs Amir Singh belonged to, did you not call out that he was a bastard Rajput? A.—I did”

That question put by the Sessions Judge to Hargobind Singh needs no comment. Amir Singh was re-called on the 8th of January and further examined. He was then cross-examined. At the close of his cross-examination he was not re-examined by the Government Pleader, but he was again examined by the Sessions Judge. In that re-examination, or whatever it may be called, by the Sessions Judge, Amir Singh committed, as we believe, deliberate perjury on a material question, having regard to the case for the defence. He said Sambhal Singh was not ill for a single day. After that re-examination by the Sessions Judge the calling and examination by him of the witnesses for the defence was again proceeded with, some witnesses being interposed to prove localities or that one of the zamindars and Bhukan Das had absconded.

We give the following extracts from the Judge's record of the 11th of January as showing how the trial was being conducted. The Judge's record is silent as to the 9th of January, and the 10th was a Sunday. This is the Judge's record of the examination of one Beni Pande, who was called and examined by the Sessions Judge, but was not, apparently, a witness for the defence. “Called by Court.—Beni Pande, son of Ramjan Pande, age 30, states on solemn affirmation.—The witness is led around through much irrelevant inquiry which it is unnecessary to record. After describing his fields lower south of Gaharwarpur :

“Q.—What servants have you? A.—One. Q.—Is he here to-day? A.—No. Q.—What is his name? A.—Wahi Dalgunjan.

Q.—What explanation have you to placing the word ‘Wahi’ before the single name ‘Dalganjan’? (No answer.) 1882

Cross-examination.—I have *jijmans* in Gaharwarpur among the Sarwárs Thákurs. I can eat *puris* and sweets at their hands. I know Amir Singh and Sambhal Singh. QUEEN-
EMPRESS
S.
HARGOBIND
SINGH.

Q. (disallowed).—‘Would you now drink water at the hands of Amir Singh?’ ”

Musai Fande was called and examined by the Sessions Judge at some length. He was cross-examined, and at the end of the record of his evidence there is the following note :—

“(Demeanour very hostile to the prosecution. Discharged.)” Then follows this memorandum, or order, of the Sessions Judge :—
“Being now night, and it being impossible to examine further witnesses, the defence are called on to declare the points on which they expect their remaining witnesses to be able to testify. Sundar and Dasaudi : it is explained that nothing is known of what they can speak to. They were named as persons who could give evidence by the witnesses for the prosecution in the Magistrate’s Court ; but as they have not been examined for the prosecution, they have been called to be present for the defence. The Amín is again sent to make more exact observations regarding the width between the southern extremity of the old Kawal and Amir’s well and to make sections of the embankment.” Then Amir Singh is re-called and further examined, and the trial is postponed.

On the 12th of January Amir Singh is re-called by the prosecution and further examined. Then the Amín is examined, and then the Sessions Judge calls and examines Sundar Dasaudi, who was mentioned in his order of the 11th. At the end of the record of Sundar’s evidence is the following note by the Sessions Judge : “(Witness is very impatient to relate a conversation with Amir Singh)” and the conversation is not recorded. The Sessions Judge, who had committed nearly every conceivable irregularity in aid of the prosecution, short of sentencing the prisoners to death without a trial, draws the line when Sundar, who was called by

1892
 QUEEN-
 EMPRESS
 v.
 HARGOBIND
 SINGH.

himself, proposed to speak to a conversation with Amir Singh. The Sessions Judge may have been right, as it is possible that the conversation may have been irrelevant, or Amir Singh may not have been cross-examined as to it. Then a witness for Hargobind Singh is called by the Sessions Judge and intimidated. Then one Dasmi Bind is called and examined by the Sessions Judge. The Sessions Judge, who just previously had prevented Sundar speaking to a conversation with Amir Singh, deliberately invites Dasmi Bind to give hearsay evidence against the prisoners. Here is the record of the question put by the Sessions Judge and the answer to it :—

*"To the Court.—Q.—*You know that a fresh start has been made with a new bit of embankment between the extreme points at which you began and left off your work. Can you tell by whom that work was done? You can mention names from hearsay. *A.—*I know nothing about it."

Apart altogether from the Judge's invitation for hearsay evidence, that was as vicious and irregular a question as was ever put in a Court of Justice. The witness had not said one word to suggest that he knew that any "fresh start" had been made.

The record of the 12th of January concludes as follows :—

"Pragash Dasondi, Sajan Pande or Somer Pande.—Defence does not want them. Bisseswar Singh has been summoned but has not attended. Warrant for his arrest to issue. Madho Singh is conveniently absent. Warrant for his arrest to issue. Case postponed till to-morrow." We are not surprised to find that witnesses required for the defence did not attend.

The Judge's record is silent as to the 13th of January.

The Judge's record for the 14th of January is so comical that it would be difficult to believe that it was the record of a criminal trial, if the record was not before us. It opens as follows :—

"Trial resumed. Present as before.

"Reported that Madho Singh cannot be found; also that the patwar cannot be found. Fresh summons for the patwari through

Collector under docket. Bisseswar Singh, called by Court after summons, states on solemn affirmation. Discharged. Note, that the defence state that it was another Bisseswar Singh they wanted.

1892

QUEEN.
EMPERESS

v.
HARGOBIND
SINGH.

"It appears there are two Bisseswar Singh of Dháranagar—one the employe of the pheridárs, known as Kanja Bisseswar Singh; the other, the alleged purchaser of the Kulwara, &c. Amir Singh tenders any information that could be got from the latter, who is the man intended by the defence," and Amir Singh is again examined apparently by the Judge.

So anxious was the Sessions Judge to get hold of a witness for the defence, that he orders a warrant to issue for the arrest of a Bisseswar Singh without taking the trouble to ascertain that he is issuing it against the right man. When the wrong man is brought before him and examined, the Sessions Judge bethinks himself of enquiring of the defence as to who was the Bisseswar Singh who was required as a witness for the defence, and as the right Bisseswar Singh was not present, he recalls Amir Singh to give the evidence which he supposes the defence intended to obtain from their own witness. Then one Wahaj-ud-din is examined by the Sessions Judge; but as apparently he could not give the information which the Sessions Judge required, the Judge makes a note: "Amir Singh offers to give information," and Amir Singh is accordingly further examined. Then comes the record of the evidence of apparently the wrong Bisseswar Singh. Then the Sessions Judge further cross-examines the prisoners Jhulai and Rajwant Singh on matters of their defence. Then Jawahir Lal is recalled, and the record for the 14th of January closes with some further examination of Amir Singh.

On the 15th of January Jawahir Lal is further examined.

On the 16th of January Umar Khan, a constable of Baragaon, was the first witness called. He was a witness for the prosecution. He said that Sambhal Singh's body was thin, and that he surmised that Sambhal Singh had been ill because his hands and feet were swollen.

1892

QUEEN-
EMPRESS
v.
HARGOBIND
SINGH.

The next witness for the prosecution was Bhairu Shankar, an Inspector of Police. He said "Rajwant Singh from the outset said he had seen the killing of Sambhal Singh, but he did not commit himself to naming any other person as having witnessed it. Jhulai Ahir, declared he had seen it, but he also refrained from disclosing any name as that of a spectator;" and later on "Rajwant said he saw Amir killing Sambhal; Jhulai, too, said he saw Amir killing Sambhal."

Brij Narayan is then called and examined, and the trial adjourned to the 18th of January.

On the 18th of January Jawahir Lal was put in the witness-box for cross-examination. The prisoners declined to cross-examine him. He had said nothing to implicate them. On the contrary, his evidence so far had been damaging to the prosecution. When the prisoners declined to cross-examine Jawahir Lal, the Sessions Judge proceeded to examine him further. In the course of that examination Jawahir Lal said: "No formal record was made of the time of the visit of Bhukan Das and Hargobind Singh at the outpost. I assign for their visit the hour of 7 A.M. at a guess - the best I can;" and later on: "I have no personal knowledge that Sambhal had been ill. I wrote that he had been suffering from fever because Amir Singh said so. Amir Singh did not try to conceal this from me. When I was investigating, my belief was that when Bhukan Das and Hargobind came to the outpost Sambhal Singh was alive. I did not think that Bhukan Das and Hargobind could have got back in time to see the death of Sambhal Singh. The time of Pryag's arrival was written down, (entered as near 8 A.M., see special diary)." Jawahir Lal further said: "I went to the scene of the murder through Karoma. I met Bahadur Singh and Rajwant Singh on the Pancakosi road in the limits of mauza Ghatoli, about half a kos from Karoma and rather less than a mile from the outpost." Then the Sessions Judge of his own motion calls Pryag Singh, the son of Sambhal Singh. As to the calling of Pryag Singh, the Sessions Judge's record shows the following: "Called by Court (sud-

denly and with precautions against any communication reaching him)."

1892

 QUEEN-
EMPERESS

 C.
HARGOBIND
SINGH.

Pryag Singh said that as he was going back from the Harahua chauki with Jawahir Lal, they met five men. "Those men were Bahadur Singh, Rajwant Singh, Jhulai Ahir, Bhukan Das, and Hargobind Singh. They came from the direction of Karoma. I pointed them out to Bahadur (Jawahir) Lal as the men who had killed my father. We had two constables with us. One was Umar Khan, the other was Khairati. The jamadár ordered all these five men to go to the *chhaoni* and stay there, as there was a charge against them ;" and further on : "We went on I urging the jamadár not to give them a chance of escape, as murder had been committed by them. I swear that there were five and not two men so met by us."

Then Umar Khan is recalled. "Every precaution has been taken to prevent communication)." He said that he followed Jawahir Lal to Gaharwarpur, walking about a gunshot distance behind, and that he had no recollection of any one being met on the road and turned back by the head constable. Then there is this note of the Sessions Judge :—(Note.—Umar Khan and Pryag are confronted; the latter is made to repeat his story and directed to look straight into the constable's face, the latter stands the ordeal : Pryag Singh does not do so satisfactory.)"

The Sessions Judge omits to mention in his record the ordeal of the *pipal* leaves. Jawahir Lal was then recalled, and said : "It will be found recorded that I met Bahadur Singh and Rajwant Singh. I was asked by the Inspector, and I told him of it." He also said "Pryag is not correct as to the spot where I met these men. It was 400 or 500 paces further east, towards Harahua. Pryag is wrong in saying there were more than two men." We believe Jawahir Lal; he is, in our opinion, a truthful witness.

The patwári is then called, and then comes the second witness called for the prosecution, who professed to have seen the murder committed.

1892

QUEEN-
EMPRESS
v.
HARGOBIND
SINGH.

The first of the four professed eye-witnesses for the prosecution was Amir Singh. The next was Garib. If Garib's evidence is true, the four appellants and Bahadur Singh killed Sambhal Singh. According to Garib, he and one Sital Pande went together to Gaharwarpur. He says that one of the zamindárs gave the order for Sambhal Singh to be struck. He is contradicted by Sital Pande as to what was going on and as to who was there when he arrived. He contradicted part of the evidence which he had given before the committing Magistrate, and then veered round and said that the evidence which he had given before the Magistrate was correct. He flatly contradicted the evidence of Amir Singh and on this point we believe him. He said: "I saw Sambhal Singh two days before his death at his house, the one to the south of Ramdin Singh's field. He was on his cot; he had fever. I did not see his hands. I saw his feet: they were swollen." And later, in reply to the Sessions Judge, he said: "Sambhal had strong fever when I saw him."

Then Jawahir Lal was recalled. Then Sheodhan Singh was called by the Sessions Judge and produced a number of records. Then came the third eye-witness for the prosecution, namely, Sital Pande, who was called on the 19th of January. According to him Sambhal Singh was killed by the appellants and Bahadur Singh. His evidence does not agree with that of Garib as to what was being done and as to who was there when they arrived Gaharwarpur. In cross-examination he denied that he lived at Rameshwar. A question as to where a witness lived is a perfectly relevant question. The cross-examination on the point was to his credit, and also, no doubt, was suggestive that he was not at Gaharwarpur on the morning in question.

He was further asked: "Have you a concubine in Rameshwar, or a second wife?" That question was disallowed by the Sessions Judge. It was a relevant question, and arose on his denial that he lived in Rameshwar. This is what the Sessions Judge says in his judgment as to that question, which he disallowed: "It is not always that a Judge is strong enough to peremptorily order a pleader to stop. This had to be done more than once in this trial."

I give an example—‘Sital Pande, who gives his age at 60, who is apparently close on 70, was asked if he was not keeping a woman. The questioner had not one titled of evidence or probability on his side. An indignant negative, however, would not wipe out, amongst those who form his little world, the recollection that the poor old man had been asked that insulting question in public, and the recollection of it will not tend to make others more willing to risk being similarly insulted. Can we be surprised that so many actual witnesses find it more convenient to say that they were looking the other way, or that they were elsewhere?’ It would possibly have been more conducive to the interests of justice if the Sessions Judge, instead of indulging in all that rhodomontade, had allowed Sital Pande to answer the question and express for himself an indignant negative, had he chosen to run the risk of doing so. The Sessions Judge, before he disallowed the question, might at least have asked the pleader if there was serious foundation for it, or he might have refreshed his memory by looking at the committing Magistrate’s record, where he would have found that this was what Sital Pande’s friend, Garib, the witness of that name for the prosecution, had said on the subject: “I know Sital Pande of Ausanpur. His residence is in Ausanpur, but he lives in Rameshwar. Sometimes he lives in Ausanpur. In Rameshwar there is a kept-woman of Sital, and in Ausanpur his wife. In Ausanpur there is one and a-half bigha cultivatory holding of Sital and his brothers. He has *shikmi* cultivation both in Rameshwar and Ausanpur. Sital lives apart from his wife and sons. He lives in Rameshwar. His house in Rameshwar is less than a mile from his house in Ausanpur. There is a river between. Sital’s sons take care of their mother, and Sital, too, assists her.” It is said on behalf of the appellants that their pleader endeavoured to get that information from Garib in the Sessions Court and that he was stopped by the Sessions Judge and told that Sital Pande was the proper person to whom such a question should be addressed. On that allegation we express no opinion.

1893

QUEEN-
EMPRESS

v.

HARGOBIND
SINGH.

The fourth and last eye-witness for the prosecution was next called. He was Ajudhia Singh, a son of Amir Singh. According

1892 to him one of the zamindars and Bhukan Das gave the order to strike Sambhal Singh, and, according to him, the appellants and Bahadur Singh killed him. Ajudhia Singh had almost as vital an interest in this case as his father, Amir Singh, had, and consequently his evidence must be regarded with caution. Ajudhia Singh had made a report to the police on the morning of the 13th of September. According to the cheque-receipt this is what he reported: "Gobind Das is constructing a ridge by demolishing my manager. My uncle, Sambhal Singh, and I warned them not to do so. On this Sambhal Singh and I were beaten to-day at 7 A.M. My uncle, Sambhal Singh, has received serious injuries and is unable to come; I have therefore come to make the report." The cheque-receipt gives the names of the persons then accused by Ajudhia Singh as "Gobind Das, Bhukan Das, Hargobind Singh, and Buddhu Koeri, residents of Karoma." That report made no mention of two of the prisoners, appellants here, whom Ajudhia knew perfectly well, and who, at the Sessions trial, he swore took part in the murder—namely Rajwant Singh and Jhulai. The four men whom Ajudhia did name in his report were the men whom he most probably would have named if this is a case of *sesarimugadana*. When Jhulai was examined before the Magistrate on the 2th of September 1891, he said that he had asked Amir Singh why he was beating Sambhal Singh with a *lathi*, that Amir Singh asked him to give evidence to the effect that 'at the request of Gobind and Bhukan, Buddhu and Hargobind had killed Sambhal. I refused to give false evidence: hence he has charged me.'

If the evidence of Jawahir Lal is true, and we believe it, it is nearly, if not almost impossible that Bhukan Das or Hargobind Singh could have been present when Sambhal Singh was killed. Jawahir Lal evidently did not believe that those men were present.

The record of the report of Pryag Singh was not drawn up at the time he made it or until later in the day, and by that time Amir Singh had accused Jhulai as a party to the murder, and accordingly in the heading of the report the name of Jhulai is mentioned in the list of names of the accused. But in the body of the

report no mention is made of Jhulai. According to the prosecution, Pryag Singh was not present when his father, Sambhal Singh, was killed.

1892

QUEEN-
EMPRESS

v.

HARGOBIND
SINGH.

After the examination of Ajudhia had been concluded, the prisoner Rajwant Singh was again examined by the Sessions Judge. The proceedings of the 19th of January closed with this note by the Sessions Judge : "The defence must have ample time to consider what witnesses, if any, they will have examined. To-morrow the Court will continue closed, as it will be a day of National mourning. The trial is adjourned to Monday, 21st January 1892 " It is only those who were responsible for the defence of these men charged with the crime of murder, or those who know what such a responsibility is, and what had taken place at this trial, who could fully appreciate the irony of that order. All the witnesses for the defence whom the Sessions Judge could get hold of had been called and examined by him, and what they had deposed had been declared by them " with a full knowledge of the provisions of section 194, Indian Penal Code."

The defence elected to call no witnesses except one to produce some documents. Then follows this note of the Judge : "Reported by the Judge's record-keeper that the record of the case ' Babu Lal Lohar, *versus* Amir Singh ' is not traceable. Amir Singh offers to give any information required."

Then the defence call Gauri Shankar to produce documents, and then Amir Singh is recalled. Some documentary evidence was then read the Government Pleader summed up the case for the prosecution, and Mr. Howard on behalf of the prisoners addressed the Court and the assessors. The Muhammadan assessor gave it as his opinion that the prisoners were guilty of the offence charged under section 302, Indian Penal Code. The two Hindu assessors were of opinion that the prisoners were not guilty, one of them being of opinion that Amir Singh killed Sambhal Singh " to land a false charge against the zamindars." The other assessor was of opinion that Sambhal Singh had died a natural death. The opinion of the assessors was recorded late in the afternoon of the 21st of

1892
—
QUEEN-
EMPRESS
v.
HARGOBIND
SINGH.

January 1892, and before 5-20 P.M. of that day the Sessions Judge had passed sentence of death on each of these four appellants. Before referring to the question as to what the Judge was bound by the law to do before passing sentence, we shall very briefly state our conclusions on the facts of this case.

On the part of the prosecution there were only four alleged eye-witnesses of the murder to support the case that these appellants had committed the murder. Those witnesses were Amir Singh, his son Ajudhia Singh, Garib, and Sital Pande. The two latter on some points which are not immaterial contradicted each other. Garib further contradicted evidence as to Ajudhia Singh which he had given before the committing Magistrate and then veered round to that evidence again. Garib contradicted the evidence of Amir Singh as to the state of health of Sambhal Singh, and in that respect supported the evidence for the case of *sesāri-muqadama* set up by the defence.

Amir Singh's evidence as to the state of Sambhal Singh's health is rendered untrustworthy by the evidence of Jawahir Lal and Umar, witnesses for the prosecution.

The evidence of Jawahir Lal, in our opinion, proves that the evidence of Amir Singh, Ajudhia Singh, Garib, and Sital Pande as to Hargobind Singh having taken part in the murder is false evidence. The report of Ajudhia Singh makes it exceedingly doubtful that Rajwant Singh or Jhulai were parties to the murder of Sambhal Singh, and that doubt is strengthened as to Jhulai by the record of the report made by Pryag Singh. If there is any truth in the case for the prosecution, Hargobind Singh, Rajwant Singh, Buddhu, and Jhulai all took part in killing Sambhal Singh. If we do not believe the evidence for the prosecution as to any one of the four accused, we cannot believe the evidence as to the others. That evidence cannot be separated, as there can be no suggestion that the witnesses for the prosecution are mistaken as to the identity of one of those men, and are speaking the actual truth as to the others. On the evidence for the prosecution, we acquit these four appellants of the charges preferred against them, and direct them to be released.

We may say that, even if the leading evidence for the prosecution were not open to the comments which we have just made, we would not consider it safe to act upon it, having regard to the illegal and irregular procedure which was adopted by the Sessions Judge, and particularly to the fact that three of the alleged eye-witnesses were not called until almost the close of the evidence, and until the Sessions Judge had extracted from the prisoners and their witnesses the whole case for the defence. For a similar reason we would not have considered it safe to act upon the evidence of Amir Singh.

1892
QUEEN-
EMPRESS
v
HARGOBIND
SINGH.

Now as to the question whether the Sessions Judge complied with the provisions of the law, which he was bound to obey, in sentencing the appellants when and as he did. As we have said, the opinion of the assessors was given and recorded late in the afternoon of the 21st of January 1892. The Sessions Judge sentenced these men to death before 5-20 P.M. that day.

Mr. Howard in his affidavit of the 15th of February 1892, of which, at latest, on the 29th of February 1892 the Sessions Judge had received a copy, swore in the 18th paragraph: "That the learned Judge, in my presence, when passing sentence of death upon the prisoners immediately after the verdict of the assessors had been delivered, in the absence of any judgment, written, delivered or explained to the prisoners, directed that the prisoners be hanged," &c. The rest of the paragraph is immaterial for present purposes.

Mr. Spankie, Public Prosecutor, admitted that no judgment had been written at the time when the sentences were passed. The Government Pleader who was engaged at the trial has stated to us in the course of this appeal that at the time when the Sessions Judge passed sentence the Sessions Judge had not written his judgment, and that what the Sessions Judge did at that time was to sign something which he had written or then wrote, as the Government Pleader though, with a pencil, and which occupied about half a sheet of paper.

The judgment, or rather what purports to be the judgment, of the Sessions Judge and is now with the record, bears the heading, Grounds for conviction of these four prisoners for the wilful

1892 murder of Sambhal Singh, charged under section 302, Indian Penal Code," and is signed by the Sessions Judge and dated "21st January 1892." In that judgment there is the finding of the Sessions Judge that all four prisoners were guilty of willful murder, but is does not contain the sentence.

1892
 QUEEN-
 EMPRESS
 v.
 HARGOBIND
 SINGH.

There is a separate document on the record which, with the exception of a few words and the signature of the Sessions Judge, and possibly the date, "21st January 1892," is not in the writing of the Sessions Judge. The following is a copy of that document:—

"In the Court of the Sessions Judge, Benares.

Present—G. J. Nicholls, Esquire, Sessions Judge.

Sessions Trial No. 79 of 1891.

Queen-Emress *versus* (1) Hargobind Singh, (2) Buddhu Koeri, (2) Rajwant Singh and (4) Jhulai Ahir.

"Committed to Sessions for trial under sections 148 and 304, Indian Penal Code by Babu Balbhaddar Singh, Deputy Magistrate 1st class, Benares, on 12th November 1891.

FINDING AND SENTENCE.

"Agreeing with the opinion of one assessor and differing with that of the two others, the Court finds that the offence of wilful murder, punishable under section 302, Indian Penal Code, is sufficiently proved by clear and consistent evidence against the prisoners (1) Hargobind Singh, (2) Buddhu Koeri, (3) Rajwant Singh and (4) Jhulai Ahir, and it accordingly directs that all the four prisoners be hanged by the neck till they be dead, at such place as may hereafter be determined by the Local Government.

(Sd.) G. J. NICHOLLS,

Sessions Judge.

21st January 1892."

It is needless to say that what we have just quoted is not the judgment which is required by sections 366 and 367 of the Code of Criminal Procedure, 1882. It could not have been considered

by the Sessions Judge to have been the judgment required by those sections, as what he has appended to his record as his judgment occupies very nearly 20 pages of rather closely-printed foolscap. That document cannot be the paper which the Government Pleader saw the Judge sign, if his memory is to be trusted.

1892
QUEEN-
EMPRESS
V.
HARGOBIND
SINGH.

The judgment bears internal evidence that it could not have been written or completed between the time when the assessors gave their opinions on the case on the 21st of January and the time when the Court closed on that day after the sentences had been passed. The opinion of one of the assessors is referred to in a part of the judgment, which is fourteen printed foolscap pages, from the conclusion of the judgment. Having regard to the position in the Judgment of the reference to the opinion of the assessor, we doubt that, even if the judgment had on the 21st of January been writtendown to that point, it could have been completed sooner^{er} than the 22nd or 23rd at the earliest. We cannot assume that a Judge, before the evidence in a case was concluded, would begin to write his judgment.

It appears from the record that the Sessions Judge was on the 26th of January, that is, four days after he had passed sentence, most irregularly completing his record by having evidence which had been given on the 7th of January read over to a witness. It is hardly necessary to say that no judgment as required by sections 366 and 367 of the Code of Criminal Procedure was pronounced or delivered in open Court in the presence of the prisoners, or at all, and that no judgment was dated or signed by the Sessions Judge in open Court at the time of pronouncing it. What justification there can be for the date "21st January 1892," being put on a judgment which was not in existence on that date we are entirely unable to understand.

The Judgment prescribed and required by sections 366 and 367 of the Code of Criminal Procedure, 1882, is a written judgment which "shall contain the point or points for determination, the decision thereon, and the reasons for the decision, and shall be dated and signed by the presiding officer in open Court at the time of pro-

1892

QUEEN-
EMPRESS
v.
HARGOBIND
SINGH

nouncing it. It shall specify the offence (if any) of which, and the section of the Indian Penal Code or other law under which the accused is convicted and the punishment to which he is sentenced. When the conviction is under the Indian Penal Code, and it is doubtful under which of two sections, or under which of two parts of the same section of the Code the offence falls, the Court shall distinctly express the same and pass judgment in the alternative. If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty," &c.

There can be no pretence for suggesting that the judgment required to be delivered and pronounced under sections 366 and 367, whether it be a judgment of conviction or a judgment of acquittal, need not contain the particulars required by section 367, or need not be pronounced, that is, read out in open Court, and need not be dated and signed by the presiding officer at the time of pronouncing it.

Further, there can be no pretence for suggesting that Sessions Judges, who are appointed and paid to administer the law in accordance with the law, are not bound to obey the specific mandates of the legislature, and may act in violation of the provisions of the Code of Criminal Procedure, 1882. Inasmuch as the sentence in the case of a conviction, and the direction to set the accused at liberty in the case of an acquittal, can only follow on the decision and cannot precede it and inasmuch as the decision must be contained in the written judgment, and there only, it necessarily follows that when, in cases like the present, to which section 367 applies, there is no written judgment when the sentence is passed, the sentence is illegal.

The requirements of sections 366 and 367 are no mere matters of form. The provisions of those sections are based upon good and substantial grounds of public policy, and whether they are or not, Sessions Judges must obey them and not be a law to themselves.

Any Judge at the conclusion of the evidence in a case, some of which may be not quite distinct in his mind owing to the length of

the trial, might pass sentence on a prisoner and find it impossible honestly afterwards to put on paper good reasons for having convicted him, or, on the other hand, might direct that the accused be set at liberty and find it impossible afterwards honestly to put on paper good reasons for the acquittal. The law wisely requires that the reasons for the decision shall accompany the decision, and shall not be left to be subsequently inserted or recorded. It is as much to the interest of the public that a guilty man should not be acquitted as it is that an innocent man should not be convicted.

We ought not to conclude this judgment without expressing our opinion on two matters : one is that the sweeping condemnation by the Sessions Judge of the Civil, Criminal and Revenue Court of the Benares district, in which the family of Amir Singh had been concerned in litigation, is entirely unjustified. The other is that, strange as it may appear after what we have been compelled to say in this judgment, we are, from our knowledge of the Sessions Judge and his work, willing to believe that in adopting the extraordinary procedure which he did, he was solely influenced by strong personal views as to zamindars and their tenants, and an honest desire that men whom he believed to be guilty should not escape being convicted.

In conclusion, we should say that we are satisfied, from our experience of the Sessions Judges of these Provinces and their work, that the procedure of the Sessions Judge in this case, upon which we have been obliged to comment, is unique, and, speaking generally, that Sessions trials are conducted with regularity, fairness, and decorum, and in accordance with law.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell, Mr. Justice Mahmood, Mr. Justice Knox and Mr. Justice Blair.

SETH CHITOR MAL (DEFENDANT) *v.* SHIB LAL (PLAINTIFF).

Co-sharers—Payment of arrears of Government revenue by one co-sharer, effect of—Charge—Lien—Act XIX of 1873 (N.-W. P. Land Revenue Act), ss. 146, 148, 150—166, 173—Act XII of 1891 (N.-W. P. Rent Act), ss. 93, 171, et seq.—Act IV of 1882 (Transfer of Property Act), s. 100.

A co-sharer in a mahál, who was also the lambardár, paid arrears of Government revenue for the years 1882, 1883, and part of 1884, in respect

1892

QUEEN-
EMPESS
v.
HARGOBIND
SINGH.

1892
June 29.

1892
SETH CHITOR
MAL
v
SHIB LAL.

of certain lands in the mahál which were the exclusive property of another co-sharer. These lands were subject to simple mortgages executed in 1873, upon which decrees were obtained in 1884, and had been sold in execution of these decrees in 1887. The co-sharer-lambardár, having obtained a decree in a Court of Revenue against the mortgagors under s. 93(g) of the N.-W. P. Rent Act (XII of 1881) for recovery of the arrears of revenue paid by him, sought to execute that decree under s. 177 of the Act by sale of the lands which had been sold in 1887; and thereupon the auction-purchaser at that sale objected under s. 178, and, the objection having been overruled, brought a suit as authorised by s. 181 in a Civil Court to establish his title to the lands and to have them protected from sale in execution of the Court of Revenue decree. This suit was decreed, and the decree, not having been appealed against, became final. Subsequently, the co-sharer-lambardár brought a suit in the Civil Court in which he claimed a decree for enforcement of lien by sale of the lands for the amount of the Court of Revenue decree, and for a declaration that the said lien "which is on account of Government," be declared preferential to the mortgages of 1873, the decrees thereon of 1884, and the sales under those decrees of 1887. He claimed this lien not only in respect of the arrears of Government revenue paid, but also in respect of future interest.

Held by the Full Bench (Mahmood, J., dissenting) :—

(i) That the Legislature had not given or recognized in the North-Western Provinces any such right of charge or lien in favour of a person paying Government revenue as was claimed here, or provided any means by which such a charge could be enforced, and that any such charge would be at variance with the policy and intention of the Government as disclosed in its legislative enactments.

(ii) That no Civil Court had jurisdiction to entertain the suit, and no Court of Revenue had jurisdiction to make a decree for sale of the immovable property or a decree in execution of which the immovable property could be sold to the prejudice of incumbrances to which it was subject.

(iii) That it was not the intention of the Legislature that a Civil Court should have jurisdiction to invest, by declaration or otherwise, a decree of a Court of Revenue with the attributes of a decree for sale such as could be passed by a Civil Court in a suit for sale under the Transfer of Property Act, 1882.

(iv) That there is no general principle of equity to the effect that whoever, having an interest in an estate, makes a payment in order to save the estate, obtains a charge on the estate, and, therefore, in the absence of a statutory enactment, a co-sharer who paid the whole revenue and thus saved the estate, does not, by reason of such payment, acquire a charge on the share of his defaulting co-sharer. *Kinu Ram Das v. Mozffer Hosain Shaha* (1) approved.

(v) That the principle of Maritime Civil Salvage had no application to the case, and that no analogy could exist between the case of a salvor in Maritime Civil Salvage and the case of a co-sharer in a mahál to whom

s. 146 or s. 148 of the North-Western Provinces Land Revenue Act (XIX of 1873) applied. *Leslie v. French* (1) and *Falcke v. Scottish Imperial Insurance Company* (2) referred to.

1892
SETH CHITOR
MAL
v.
SHIB LAL.

THIS was a reference made to the Full Bench by Edge, C.J., and Blair, J. The facts of the case are fully stated in the judgment of Edge, C.J.

The Hon. Mr. *Spankie* and Babu *Durga Charan Banerji* for the appellant.

Babu *Jogindro Nath Chaudhri* for the respondent.

EDGE, C.J.—These two Second Appeals arise out of the same suit, and are brought by Seth Chitor Mal, a defendant in the suit. The respondent in each appeal is Shib Lal, who was the plaintiff in the suit. The suit was brought in the Court of the Haveli Munsif of Aligarh. From the decree of the Munsif there were two appeals to the Court below, and in each appeal a decree was passed. Seth Chitor Mal was dissatisfied with each of the decrees of the Subordinate Judge and accordingly has brought these appeals.

The facts necessary for understanding the questions which arise in these appeals are shortly as follows:—

At the time of making of the mortgages, to which I shall presently refer, Mukha, Lekha, Fattah, Bhagwan, and Radha were co-sharers in a mahál in which they owned plots numbered in the khewat 49 and 50 as their share.

Plot numbered 49 contained 54 bighás, 8 biswas, and plot numbered 50 contained 29 bighas, 5 biswas.

On the 24th of June 1873 Mukha, Lekha, Fattah, and Bhagwan executed a simple mortgage, as a simple mortgage is defined in section 58 of the Transfer of Property Act, 1882, in favour of Seth Chitor Mal, by which they purported to mortgage 44 bighas, 10½ biswas of the 54 bighas, 8 biswas. On the 1st of July 1873, Mukha, Lekha, and Fattah executed a simple mortgage in favour of Seth Chitor Mal, by which they purported to mortgage 28 bighas, 3 biswas in the mahál.

On the 28th of March 1884 Seth Chitor Mal, in a suit in which he was the plaintiff, and Sri Ram, adopted son of Lekha,

(1) L. R., 23, Ch. D., 552.

(2) L. R., 34, Ch. D., 234.

1892
 SETH CHITOR
 MAL
 v.
 SHIB LAL.

deceased, Mukha, and Fatteh were defendants, obtained, apparently under section 88 of the Transfer of Property Act, 1882, a decree on his simple mortgage of the 1st of July 1873 for sale of 28 bighas, 3 biswas of land. On the 31st of March 1884 Seth Chitor Mal, in a suit in which he was the plaintiff, and Sri Ram, adopted son of Lekha, deceased, Mukha, Jewan and Kanhiya, minor sons, and Musammatt Hira, widow of Bhagwan, deceased, and Fatteh were defendants, obtained apparently under section 88 of the Transfer of Property Act, 1882, a decree on his simple mortgage of the 24th of June 1873 for sale of 44 bighas, 14 biswas of land. What were the proceedings which took place under those decrees between the dates of those decrees and the dates of the auction sales held in execution of them do not appear on the record of this suit, except that 54 bighas, 8 biswas and 14 bighas, 12½ biswas were advertised for sale under those decrees.

On the 23rd of February 1887, at an auction sale under those decrees, Seth Chitor Mal purchased 14 bighas, 12½ biswas of land out of 29 bighas, 5 biswas. The sale certificate is dated the 25th of April 1887, and that sale was duly confirmed. On the 21st of October 1887, at a further auction sale under those decrees, Seth Chitor Mal purchased 54 bighas and 8 biswas of land. The sale certificate is dated the 24th of December 1887, and that sale was duly confirmed.

Shib Lal, the plaintiff, respondent here, who was a lambardár and a co-sharer in the mahál in which the lands in question were, having paid certain arrears of land-revenue for the years 1289, 1290, and part of 1291 Fasli, corresponding roughly with the years 1882, 1883, and part of 1884 of the Christian era, brought a suit in a Court of Revenue, under clause (g) of section 93 of Act No. XII of 1881, against Mukha, Sri Ram, Musammatt Hira, widow, and Jiwan and Bhodar (*sic*) sons of Bhagwan, deceased, Fatteh and Radha to recover Rs. 402-5-1, principal and interest, and Rs. 23-12 costs, and obtained on the 7th of April 1885 a decree for Rs. 426-1-1. The Rs. 402-5-1 included the arrears of land-revenue paid by Shib Lal

Seth Chitor Mal was not a defendant to that suit. Shib Lal endeavoured to execute that decree under section 177 of Act No. XII of 1881 by sale of the 54 bighas, 8 biswas and the 14 bighas, 12½ biswas which had been purchased, as already mentioned, by Seth Chitor Mal. Seth Chitor Mal, before the day fixed for the sale, appeared under section 178 of Act No. XII of 1881, claimed a right and interest under his mortgage decrees and sale certificates in those lands, and objected to their being sold in execution of Shib Lal's Court of Revenue decree. On that claim the Collector of the district finally made an order under sections 179 and 180 against Seth Chitor Mal. Thereupon, and within one year from the date of that order, Seth Chitor Mal brought his suit as authorised by section 181 of Act No. XII of 1881 in a Civil Court of competent jurisdiction against Shib Lal, Sri Ram, adopted son of Lekha, deceased, Mukha, and Jewan Lal and Kanhaiya, sons, and Musammat Hira, widow, of Bhagwan, deceased, to establish his right to the 54 bighas, 8 biswas and the 14 bighas, 12½ biswas, and to have them protected from sale in execution of Shib Lal's Court of Revenue decree, and on the 4th of September 1888 obtained the decree which he asked for in his suit, namely, a decree establishing his title to the 54 bighas, 8 biswas and the 14 bighas, 12½ biswas, and protecting them from sale in execution of Shib Lal's Court of Revenue decree. That decree was appealable, but no appeal was brought against it, and whether it was justified by the facts or in law is now immaterial, as the decree long since became final as between Seth Chitor Mal and Shib Lal.

On the 18th of January 1889, and after Seth Chitor Mal's decree of 4th of September 1888 had become, by reason of the Indian Limitation Act, 1877, non-appealable, Shib Lal brought the suit out of which these two appeals have arisen. The object of this suit is to get behind Seth Chitor Mal's decree of the 4th of September 1888, and to get from a Civil Court a decree for sale of the 54 bighas, 8 biswas and the 14 bighas, 12½ biswas, which would confer on a purchaser at an auction-sale held in execution of it, priority of title over such title and interest as Seth Chitor Mal has in the lands.

1882

SETH CHITOR
MAL
v.
SHIB LAL.

1892

The reliefs which Shib Lal claims in this suit are, as translated

SETH CHITOR as follows :—

MAL
v.
SHIB LAL.

“(a) A decree be passed in plaintiff's favour for enforcement of the hypothecation lien on account of Rs. 426-1-1 paid as Government revenue and recorded in the decree, together with costs and future interest, and for the auction sale of the zamindari property, in extent 54 bighas, assessed at Rs. 128-4-6 and 14 bighas, 10 biswas, for which revenue has been paid, and plaintiff's hypothecation lien, which is on account of Government, be declared superior and preferential to the hypothecation lien in favour of defendant, the second party, and the aforesaid property be sold by auction without any regard to other demands, liabilities or liens.

“(b) The costs of this suit, together with future interest, be caused to be paid.

“(c) Any other reliefs or directions which the Court may consider necessary be likewise given to the plaintiff.”

The defendant described in that prayer for relief as the “defendant, second party” is Seth Chitor Mal, and the decree in which it is stated that the Rs. 426-1-1 was recorded is Shib Lal's Court of Revenue decree of the 7th of April 1885.

It may be noticed that Shib Lal in relief (a) is claiming a lien or charge more extensive than that which the Government had for the arrears of land-revenue, for he claims a lien not only in respect of the arrears of land-revenue which were actually paid, but also in respect of future interest, whereas section 148 of Act No. XIX of 1873 enacts that “no interest shall be demanded on any arrear of land-revenue” He is also seeking to have the charge, which he claims to be entitled to, enforced by the Civil Court, which is not the tribunal by the aid of which the Government can enforce the charge which it has for arrears of land-revenue.

Having regard to the relief which Shib Lal claims, it is necessary not only to consider whether by the payment of the arrears of land-revenue Shib Lal obtained the charge which the Government had, which was a charge enforceable by sale and having a priority over all

mortgages and incumbrances upon the land, but whether Shib Lal has by such payment obtained any other charge in enforcement of which he is entitled to bring the lands to sale by the aid of the Civil Court in this suit. It will also be necessary to consider whether a Civil Court had any jurisdiction to entertain this suit.

In considering the questions arising in this case, it is necessary to bear in mind that when the arrears of the land-revenue, in respect of the payment of which Shib Lal claims a charge upon the lands in suit were accruing, accrued, and were paid, Shib Lal had no interest of any kind in those lands, and that his interest was in other lands in the mahál which might in certain events have been sold as part of the mahál by the Collector of the District in satisfaction of the arrears of the land-revenue, for which the entire mahál and the proprietors, as that word is used in section 146 of Act No. XIX of 1873 (the North-Western Provinces Land-Revenue Act, 1873), as amended by Act No. VIII of 1879, were jointly and severally responsible to the Government. Even if it were a true proposition that there is a general principle of equity that whoever, having an interest in an estate, makes a payment in order to save the estate, thereby obtains a charge upon the estate, and if Shib Lal could be said to have had, when he paid the arrears of land-revenue, an interest in the lands in suit, in which in fact he had no interest whatsoever, it would be necessary to consider whether the Legislature intended that a co-sharer or a lambardár in a mahál who paid an arrear of the land-revenue should, in respect and by force of such payment, obtain a charge upon lands in the mahál the exclusive property of another co-sharer, and provided any means by which any such charge could be enforced.

It must not be assumed that the proprietors or co-sharers in this mahál were co-sharers in each other's share. In truth the proposition which Shib Lal contends for is, that there exists a principle of equity applicable to land by which, apart from express contract or legislative enactment, one of several debtors jointly and severally liable at principals, and not as co-sureties, for a debt charged on their separate lands who pays that debt in order to prevent his own

1892

SETH CHITOR

MAL

v.

SHIB LAL.

1892
SETH CHITOR
MAL
v.
SHIB LAL.

particular lands, together with the separate lands of his co-debtors being sold, obtains thereby, not merely a right of contribution enforceable in the ordinary way by means of a decree for money, but a charge over such separate lands of his co-debtors on which he can obtain a decree for sale of those separate lands of his co-debtors and a decree for sale which would confer on a purchaser at a sale in execution of it, priority of title over all previous mortgages and incumbrances. That is a startling proposition when one comes to consider it carefully. It is all the more startling as applied to this case from the fact that the means by which Shib Lal could alone, if at all, enforce the charge which he claims were not open to the Government for the enforcement of the charge which it had, and that the means by which the Government could have enforced its charge are inapplicable to the enforcement of a charge by Shib Lal.

In endeavouring to arrive at a conclusion as to whether Shib Lal did by his payment of the arrear of land-revenue obtain any such charge as that which he claims, I propose to consider the Acts of the Indian Legislature in order to see what light they throw upon this question, and in doing so to see whether if Shib Lal has any such charge the Legislature provided any means by which he could enforce it. If it appears that the Legislature has not only not recognised the existence of any such principle as that contended for, as a part from legislative creation, but has provided no means by which such a charge as that claimed by Shib Lal could in these Provinces be enforced, and has in other Provinces created by legislative enactment rights of charge on behalf of certain classes of persons paying under certain circumstances arrears of Government revenue, I think it may be safely concluded that the Legislature did not intend, except in those cases for which it has expressly provided by enactment, that a lambardár, co-sharer or other person having an interest in a mahál or in any part of it, should, by payment of an arrear of land-revenue acquire any charge, much less a charge taking priority over all mortgages and incumbrances on the land, and it may further be concluded that no such right of charge exists in these Provinces.

Before examining the legislative enactments which may throw any light upon this case, I shall again briefly state what Shib Lal is contending for. It is contended on behalf of Shib Lal that by reason of his payment of the arrear of land-revenue which became due for the years 1289, 1290, and part of 1291 Fasli, he acquired either a charge on the lands in suit or a right to have a charge declared and enforced by sale of the lands in suit, and that such charge or right of charge took priority over the mortgages of 1873, the decrees upon those mortgages in 1884, and the sale under those decrees in 1887.

1892
SETH CHITOR
MAL
v.
SHIB LAL.

If such a charge of right of charge exists, it must arise in this case, either by legislative enactment or by virtue of some principle of equity, not inconsistent with the statute law in force in these Provinces.

So far as Act No. XIX of 1873 (the North-Western Provinces Land-Revenue Act, 1873) as amended by Act No. VIII of 1879, is concerned, the only sections which appear to have any bearing on this subject are the sections contained in chapter V of that Act.

The inferences to be drawn from those sections are in my opinion adverse to the contention of Shib Lal. I think it necessary to refer to a few only of the sections contained in Chapter V.

Section 146 enacts that "in the case of every mahál the entire mahál and all the proprietors jointly and severally shall be responsible to Government for the revenue for the time being assessed on the mahál. *Explanation*,—Proprietor in this chapter includes also a farmer and a mortgagee in possession." Seth Chitor Mal at the time the arrears of land-revenue were paid by Shib Lal was not a proprietor in the mahál within the meaning of section 146, nor was he then a person responsible to Government for the revenue for the time being assessed on the mahál. Section 148 enacts "any sum not so paid becomes thereupon an arrear of revenue, and the persons responsible for it become defaulters. No interest shall be demanded on any arrear of land-revenue. If the settlement has been made with a lambardár on behalf of the proprietary body, both the lambardár and the persons so responsible shall be deemed defaulters."

1892
 SETH CHITOR
 MAL
 v.
 SHIB LAL.

By section 150 certain processes are provided by which an arrear of land-revenue may be recovered by the Collector of the District on behalf of the Government. Amongst other processes provided by that section, there are the following: “(e) by transfer of such share or patti to a solvent co-sharer in the mahál;” “(g) by sale of such patti, or of the whole mahál;” and “(h) by sale of other immoveable property of the defaulter.” Section 157, so far as is material, enacts “when the arrear is due in respect of a share or patti of a mahál, the Collector of the district may, with the previous sanction of the Commissioner of the Division, in cases where the annual revenue payable in respect of such share or patti does not exceed fifty rupees, and in other cases with the previous sanction of the Board, transfer such share or patti for a term not exceeding 15 years from the first day of July next after the date of the sanction, to any or all of the other co-sharers, on condition of their paying such arrear and on such terms as the Commissioner or Board (as the case may be) in each case may think fit A transfer under this section shall not affect the joint and several liability of the co-sharers of the mahál in which it is enforced.”

- Section 166 enacts so far as is material “when an arrear of land-revenue has become due, and the Collector of the District is of opinion that the other processes hereinbefore provided are not sufficient for the recovery of such arrear, he may, in addition to, or instead of, all or any of such other processes, and subject to the provision hereinafter contained, and with the previous sanction of the Board, sell by auction the patti or mahál in respect of which such arrear is due.” The proviso to 166 does not affect the question we have to consider. Section 167 enacts “land sold under the last preceding section shall be sold free of all incumbrances, and all grants and contracts previously made by any person other than the purchaser in respect of such land shall become void as against the purchaser at the auction sale. Nothing in the former part of this section applies (a) in districts or portions of districts permanently settled, to farms granted in good faith at fair rents, and for specified areas, by a former proprietor for terms not exceeding 20 years,

under written leases duly registered ; (b) in all districts, to lands held under *bona fide* leases at fair rents, temporary or perpetual, for the erection of dwelling-houses, or manufactories, or for mines, gardens, tanks, canals, places of worship, burying-grounds, such lands continuing to be used for the purposes specified in such leases."

1892
SETH CHITAB
MAL
SHIB LAL

Section 168 enacts that in the events therein mentioned a defaulter's interests in any other mahál may be sold, "provided that no other interests save those of the defaulter alone shall be so proceeded-against, and no incumbrances created or contracts entered into by him in good faith shall be rendered invalid by such proceedings." Section 173 enacts "if the defaulter pay the arrear in respect of which the land is to be sold at any time before the day fixed for the sale, to the person appointed under section 147 to receive payment of the land-revenue assessed on such land, or to the Collector of the district, or the Assistant Collector in charge of the Sub-division of the district in which the land is situate, the sale shall be stayed."

It is to be observed that not only is the patti or mahál in respect of which arrears of land-revenue remain unpaid liable to be sold for the recovery of such arrears, but that every person who is, under section 146 or section 148, responsible to Government for the land-revenue so in arrear, is a defaulter, and may be proceeded against as such, although he may have paid to the Government what represented as between him and his co-sharers in the patti or mahál his quota or share of the land-revenue, the liability for the payment of the land-revenue being joint and several, and those being the terms upon which the co-sharers hold the patti or the mahál.

There are, besides the processes for the recovery by the Government of arrears of land-revenue provided by the sections from which I have quoted, other processes provided by chapter V by which the Government may recover arrears of land-revenue.

Chapter V of Act No. XIX of 1873, which enacts what are the liabilities of proprietors and co-sharers and how the land-

1892
 SETH CHITOR
 MAL
 v.
 SHIB LAL.

revenue may be collected and arrears of land-revenue may be recovered, does not enact that a co-sharer or lambardár who pays the particular quota of land-revenue of his co-defaulter shall have any lien on his co-defaulter's share in respect of such payment, except in the case and in the manner specified in section 157, the manner specified being a transfer of the co-defaulter's share for a period not exceeding 15 years by the Collector with the sanction of the Commissioner or the Board of Revenue, as the case may be, to any or all the other co-sharers on condition, amongst possibly others, of their paying the arrear. The Legislature, if it had seen fit, might have enacted in Act No. XIX of 1873 that a lambardár or a co-sharer, on payment of an arrear of land-revenue, should have a charge on the share of the co-sharer who was the primary defaulter, but it has not done so. If the Legislature intended that a lambardár or a co-sharer who, in order to prevent the patti or mahál being sold under section 166, paid the arrear of land-revenue, should have a charge in respect of such payment the appropriate place to have inserted words which would have given effect to such an intention would have been in section 173; but neither in that section, nor elsewhere in Act No. XIX of 1873, is any such intention expressed, or any words used from which such an intention could be inferred.

I have been unable to find anything in the Indian Contract Act, 1872 (Act No. IX of 1872) from which I can infer that a lambardár or co-sharer is entitled to a charge in respect of arrears of land-revenue paid by him.

Section 100 of the Transfer of Property Act, 1882 (Act No. IV of 1882) would not apply, unless the property the subject of this suit was "by act of parties or operation of law made security for the payment" to the plaintiff of the money paid by him in respect of the arrears. No such "act of parties" is alleged; and so far as I can see, the property was not by operation of law made security for any payment to the plaintiff. If, however, section 100 of the Transfer of Property Act, 1882, does apply, and the plaintiff has, within the meaning of that section, a charge on the property in

suit, it is not the charge which he contends for, that is a charge which would give him priority not only over the decrees on the prior mortgages and the certificates of sale, but over those prior mortgages which were made many years before the arrears of land revenue which were paid by Shib Lal accrued due, but a charge by which he would stand *qua* his charge in no higher position than that in which a second mortgagee stands a first mortgagee. The rights of a second mortgagee as such against the first mortgagee are, so far as redemption, foreclosure and sale are concerned, defined by section 75 of the Transfer of Property Act, 1882, and are the same rights as the mortgagor has against the first mortgagee, and no more. A mortgagor could not as against his mortgagee obtain, except by legislative enactment or as the result of a contract, a prior charge on, or a right to sell with priority of title, the mortgaged property in respect of a discharge by a payment made by the mortgagor of a liability on the property which first arose after the making of the mortgage. The principle of the shield, even if the shield could be used as a weapon of offence, could not apply in such a case.

1892
SETH CHITOR
MAL
v.
SHIB LAL.

The result so far is that I find nothing in Act No. XIX of 1873, the Indian Contract Act, 1872, or the Transfer of Property Act, 1882, which suggests that any such charge as is contended for here, has been given by the Legislature in any of those enactments.

I now propose to show that the Legislature not only before but since the passing of Act No. XIX of 1873, must have considered that, except by legislative enactment, no person interested for the protection of his own interest as a tenant, a co-sharer or an incumbrancer in having Government revenue paid, would by the mere payment of an arrear of the Government revenue obtain any charge whatever upon lands liable to be sold by the Government in satisfaction of the arrear. And further I propose to show, so far at least as these Provinces are concerned, that any such charge as is contended for by Shib Lal would be at variance with the policy of the Government as disclosed in its legislative enactments, and that in these Provinces no means has been provided by which a lambardár or co-sharer could enforce any such charge if he had it.

1892

SETH CHITOR
MAL
v.
SHIB LAL.

Act No. I of 1845 was an Act for the realisation of land revenue. By sections 26, 27, 28, and 29 of that Act the purchasers at a sale by the Government for arrears of land-revenue of the estates therein referred to, acquired those estates with certain exceptions free from all incumbrances. By section 29 it was enacted "and it is hereby enacted that excepting Co-partners of Estates under Butwarrah who may have saved their shares from sale under sections 33 and 34, Regulation XIX, 1814, any recorded or unrecorded Proprietor or Co-partner, who may purchase in his own name or in the name of another the Estate of which he is Proprietor or Co-partner, or who by re-purchase or otherwise may recover possession of the said Estate after it has been sold for arrears under this Act; and likewise any purchaser of an Estate sold for other arrears or demands than those accruing upon itself, shall by such purchase, acquire the Estate subject to all its incumbrances existing at the time of sale, and shall not acquire any rights in respect to ryots and under tenants which were not possessed by the previous Proprietor at the time of the sale of the said Estate." Section 9 of Act No. I of 1845 was as follows: "And it is hereby enacted, that Collectors shall, at any time before sunset of the latest day of payment, receive as a deposit from any party not being a Proprietor of the Estate in arrear, the amount of the arrear of revenue due from it, to be carried to the credit of the said Estate at sunset as aforesaid, unless before that time the arrear shall have been liquidated by a Proprietor of the Estate. And in case the party so depositing, whose money shall have been credited to the estate in the manner aforesaid, shall be a plaintiff in a suit pending before a Court of Justice for the possession of the same or any part hereof, it shall be competent to the Judge of the Zila in which such Estate is situated, to order the said party to be put into temporary possession of the said Estate, subject to the rules in force for taking security in the cases of appellants and defendants. And if the party depositing whose money shall have been credited as aforesaid shall prove before a competent Civil Court that the deposit was made in order to protect an interest of the said party, which would have been endangered or damaged by the sale of the estate, he shall

be entitled to recover the amount of the deposit with interest, from the Proprietors of the said Estate."

1892

SETH CHITTOB
MAL
v.
SHIB LAL.

Act No. XI of 1859 is "an Act to improve the law relating to sales of land for arrears of revenue in the Lower Provinces under the Bengal Presidency." Sections 9 of Act No. XI of 1859 is almost in terms similar to those of section 9 of Act No. I of 1845, except that it contains an addition in the following words ; "And if the party so depositing, whose money shall have been credited as aforesaid, shall prove before such a Court that the deposit was necessary, in order to protect any lien he had on the estate or share or part thereof, the amount so credited shall be added to the amount of the original lien."

Act No. II of 1864 (Madras) is "an Act to consolidate the laws for the recovery of arrears of revenue in the Madras Presidency." By section 35 of that Act, when arrears of public revenue are paid by a tenant, he is entitled to deduct the amount paid from the rent then or afterwards due by him to the defaulter ; and the arrears, "if paid by a *bona fide* mortgagee or other incumbrancer upon the estate, shall constitute a debt from the defaulter to him, and shall be a charge upon the land, but shall only take priority over other charges, according to the date at which the payment was made."

I have not sufficient information as to the tenures in the Presidency of Bombay to enable me to refer with any certainty to the provisions of Act No. V of 1879 (Bombay) ; but it appears from section 136 of that Act that when land revenue for which the registered occupant or superior holder is primarily responsible to the Government is recovered from a co-occupant, co-sharer, inferior holder or person in actual possession of land, such co-occupant, co-sharer, inferior holder or person in actual possession of the land does not obtain a charge, but is entitled to credit in account with the registered occupant or superior holder or with his landlord for the amount recovered from him.

I think it appears from Act No. I of 1845, Act No. XI of 1859, and Act No. XIX of 1873, Act No. II of 1864 (Madras) and, so far as I understand it, from Act No. V of 1879 (Bombay) that when

1892 it was intended that there should be a charge or lien or any other
SETH CHITOR protection in respect of a payment made in respect of arrears of land
MAL revenue the charge, lien or protection, as the case might be, was
v
SHIB LAL. specifically given by legislative enactment.

The lien given in Lower Bengal by section 9 of Act No. XI of 1859, and that given in Madras by section 35 of Act No. II of 1864 (Madras) fall far short of the charge contended for here, which is a charge with priority over all previous mortgages and incumbrances. Further, the lien given by section 9 of Act No. XI of 1859 is only given when it is proved that the payment of the arrear was necessary in order to protect any already existing lien, and only entitles the party who obtains to add the amount paid to the amount of his original lien. The charge given in Madras by sections 35 of Act No. II of 1864 (Madras) is not given to any one except a *bona fide* mortgagee or incumbrancer upon the estate, and only takes priority over other charges according to the date at which the payment was made.

That any such charge as is contended for here would be at variance with the policy of the Government, at any rate as applied to these Provinces, is, I think, apparent from a consideration of sections 150 to 166 inclusive of Act No. XIX of 1873, and of section 171 of Act No. XII of 1881. Sections 150 to 166, inclusive, of Act No. XIX of 1873 show that it is the policy and intention of the Government that when its processes for the recovery of arrears of land revenue are put in action it is only when all the other processes fail that a sale of the immoveable property of the defaulter shall be resorted to. Section 171 of Act No. XII of 1881 shows that it is the intention of the Government that a sale of immoveable property in execution of a decree of a Court of Revenue for the payment of arrears of rent or revenue or of money under that Act shall not be resorted to unless satisfaction of the judgment cannot be obtained by execution against the person or moveable property of the debtor. Section 322 to 324 inclusive of the Code of Civil Procedure afford further evidence of what the policy of the Government is. If the charge claimed in this case exists and can be

enforced, a lambardár or recorded co-sharer would on payment of an arrear of land-revenue on the day after it became due obtain a charge on immoveable property which he could proceed to enforce by obtaining a decree for sale of the immoveable property, and selling the immoveable property in execution of that decree, and would thus frustrate the obvious intention of the Government as disclosed in legislation that all other means shall be resorted to before an owner shall be deprived by sale of his holding unless he has by contract specifically mortgaged or charged the same with the payment of money and a decree thereon for sale has been passed.

1892
SETH CHITOR
MAL
SHIB LAL.

I now intend to show that even if a lambardár or co-sharer does on payment of an arrear of land-revenue obtain by the application of any principle of equity a charge on the mahál or on any part of it, no means has been provided by which he can in these Provinces enforce such charge by a sale under a decree for sale of immoveable property, or obtain a declaration that he has such a charge or any right to any such charge.

The jurisdiction of Courts in these Provinces to entertain suits is conferred by legislative enactment or by Regulation. There is no Regulation which applies in this case. If there is a jurisdiction in any Court to entertain this suit, assuming that section 13 of the Code of Civil Procedure does not apply to it, the jurisdiction must be found in the Code of Civil Procedure or in Act No. XII of 1881 (the North-Western Provinces Rent Act, 1881). If any section of the Code of Civil Procedure gives a Civil Court jurisdiction to entertain this suit it is section 11. Section 11, so far as it is material, is as follows :—

“The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature, excepting suits of which their cognizance is barred by any enactment for the time being in force.”

In order to ascertain if the cognizance by a Civil Court of this suit is barred by any enactment for the time being in force, we must turn to Act No. XII of 1881. The first paragraph of section

1892
 SETH CHITOR
 MAL
 v.
 SHIB LAL.

93 of Act No. XII of 1881 is as follows :—"Except in the way of appeal, as hereinafter provided, no Courts other than Courts of Revenue shall take cognizance of any dispute or matter in which any suit of the nature mentioned in this section might be brought, and such suit shall be heard and determined in the said Courts of Revenue in the manner provided in this Act, and not otherwise." That is as distinct a prohibition as the Legislature could by any possible use of words have enacted. Not only does section 93 enact that the Courts of Revenue are to be the Courts of first instance for all suits of the nature mentioned in the section, but it prohibits any Court except a Court of Revenue, or a Court of Appeal as such sitting in Appeal from a Court of Revenue, from taking cognizance of *any dispute or matter* in which any such suit might be brought. Clause (g) of section 93 is as follows : "Suits by lambardárs for arrears of Government revenue, payable through them by the co-sharers whom they represent, and for village expenses and other dues for which the co-sharers may be responsible to the lambardárs." Clause (k) of section 93 is as follows : "Suits by recorded co-sharers to recover from a recorded co-sharer who defaults arrears of revenue paid by them on his account." It follows that no Court other than a Court of Revenue can as a Court of first instance take cognizance of a suit of the nature of a suit by a lambardár for arrears of Government revenue payable through him by the co-sharers whom he represents, or of a suit of the nature of a suit by a recorded co-sharer to recover from a recorded co-sharer who defaults arrears of revenue paid by him on account of such defaulter, *or of any dispute or matter* in which a suit of the nature mentioned in clause (g) or in clause (k) might be brought.

It cannot be contended that the dispute in this suit is not a dispute as to the recovery by the plaintiff of moneys paid by him as lambardár for arrears of Government revenue which were payable through him by the co-sharers whom he represented. The fact that the plaintiff seeks in this suit a decree or declaration that he is entitled to recover such moneys in a particular way or by a particular process does not make the dispute any the less a dispute of the nature which I have men-

tioned, or any less a dispute in which a suit of the nature mentioned in clause (g) might be brought, although in a suit under clause (g) the plaintiff could not obtain the decree or declaration which he seeks to obtain in this suit, even if Seth Chitor Mal had been a mortgagee in possession and a co-sharer at the time the arrears became due and were paid and could have been made a defendant to a suit under clause (g). Effect must be given to the words "dispute or matter" in section 93, as they were obviously inserted in that section with the object of limiting the jurisdiction of Civil Courts further than that jurisdiction would probably have been limited if the section had not contained those words, and had run as follows: "Except in the way of appeal as hereinafter provided no Courts other than Courts of Revenue shall take cognizance of any suit mentioned in this section, and such suit shall be heard and determined in the said Courts of Revenue in the manner provided in this Act and not otherwise." If section 93 were so worded, it might be possible to contend successfully that as a suit under clause (g) is a suit in which a Court of Revenue could not give a decree for sale, or what is called sometimes an hypothecation decree, the jurisdiction of a Civil Court to entertain and determine this suit is not barred. I consequently come to the conclusion that section 93 of Act No. XII of 1881 bars the Civil Courts from taking cognizance of this suit and of any similar suit not authorized by section 181 of that Act to be brought in a Civil Court.

1882
 SETH CHITOR
 MAL
 v.
 SHIB LAL.

This suit, as I shall presently show, is not a suit to which section 181 Act No. XII of 1881 applies. It consequently remains to be seen whether a Court of Revenue in these Provinces could make a decree for sale of immoveable property in a suit by a lambardár or a recorded co-sharer, or could make a declaration that a lambardár or a recorded co-sharer had a charge on immoveable property in respect of arrears of land-revenue paid by him.

It is obvious, from a consideration of Act No. XII of 1881, that a Court of Revenue cannot make a decree ordering the sale of immoveable property, or a decree declaring a charge upon immoveable property. The whole procedure for executing a decree of a Court of

1892
 SETH CHITOR
 M & L
 v.
 SHIB LAL,

Revenue negatives the existence of any such jurisdiction in a Court of Revenue. The sections of Act No. XII of 1881 immediately dealing with the execution against immoveable property of a decree of a Court of Revenue for the payment of arrears of revenue or money commence with section 171. The provisions of sections 173, 174, 174A, 175 and 176 are entirely at variance with the notion of the decree in execution being one for sale of immoveable property. Section 177 shows that where immoveable property is sold, it is sold not by force of a decree for sale but under an order of the Board of Revenue in aid of a decree for money. If the Board of Revenue orders the property to be sold, section 177 enacts that "the sale shall be made under the rules in force for the sale of land for arrears of land-revenue, but without prejudice to the incumbrances (if any) to which such property may be subject." No words could show more conclusively than those which I have just quoted that a decree under clause (g) or under clause (k) of section 93 could not declare a priority of charge or any charge, or create a right of charge, or operate as a charge. Beyond all doubt, as it appears to me those words show that the charge which the Government has for arrears of land revenue does not pass to the lambardár or co-sharer who pays the arrears. Section 178 enables a third party to appear before the Collector of the District or Assistant Collector and claim a right or interest to or in any of the property about to be sold under section 177. Sections 179 and 180 deal with the adjudication of the Collector or Assistant Collector on a claim made under section 178. Section 181 enacts "(a) No appeal shall lie from any order passed under section 179 or section 180 by the Collector of the District;

"(b) But the party against whom the same is passed may institute a suit in the Civil Court to establish his right at any time within one year from the date of the order ;

"(c) Provided that, if the order be for the sale of the property taken in execution, and the property is moveable, the suit shall not be for the recovery of such property, but shall be for compensation from the judgment-creditor by whom it was brought to sale."

No order under section 179 or section 180 of Act No. XII of 1881 was made against Shib Lal, and the result appears to me to be that no Court had jurisdiction to entertain this suit by him for a decree for sale of the immoveable property or for a declaration that he had or was entitled to a charge. Further, at any suit which Shib Lal could have brought for the recovery of arrears of land-revenue paid by him must necessarily, according to section 93 of Act No. XII of 1881 and section 11 of the Code of Civil Procedure, have been brought in a Court of Revenue and not in a Civil Court, and as a Court of revenue has no jurisdiction to make a decree for sale of immoveable property, or a decree in execution of which immoveable property could be sold, to the prejudice of the incumbrances to which such property was subject, I fail to see how a Civil Court could in a suit authorised by section 181 of Act No. XII of 1881 or in any other suit for arrear of land-revenue make a declaration that a decree of a Court of Revenue operated as a decree for sale, or operated to create a charge, or could decree a sale of the immoveable property, to the prejudice of the incumbrances to which it was subject, or make any decree which could have that effect.

1882

SETH CHITOR
MAL
v.
SHIB LAL.

In a suit authorised by section 181 of Act No. XII of 1881 a Civil Court could decree that the immoveable property was or was not subject to the incumbrances or to the right or interest claimed by the objector who preferred his claim under section 178 of Act No. XII of 1881, and presumably could declare whether or not such right or interest was one which would disentitle the judgment-creditor from bringing the immoveable property to sale under section 177 of that Act.

It was contended that as questions of title to land are, as a rule, for a Civil Court and not for a Court of Revenue, this suit was maintainable in the Civil Court as it raised a question of title. That contention is based on an incorrect reading of Act No. XII of 1881 and on the assumption that in order to obtain the decision of a Civil Court on a question of proprietary title to land, it is necessary in all cases that a suit should be brought in the Civil Court.

1892
SETH CHITOR
MAL
v.
SHIB LAL.

By section 189 of Act No. XII of 1881 an appeal lies to the Civil Court from the decision of a Collector or Assistant Collector of the 1st class in all suits mentioned in section 93, in which the proprietary title to land has been determined between parties making conflicting claims thereto. By section 183 of Act No. XII of 1881 an appeal lies to the Collector from all decisions of an Assistant Collector of the second class in suits mentioned in section 93. Under section 178, as we have seen, a third party may appear before the Collector or Assistant Collector and claim a right or interest to or in any of the property about to be sold in execution of a decree of a Court of Revenue, and under section 181 the party against whom an order of the Collector is passed under section 179 or section 180 may within one year from the date of the order institute his suit in a Civil Court to establish his right.

Seth Chitor Mal, the defendant-appellant here, whose claim was disallowed under section 176 of Act No. XII of 1881, brought in the Civil Court within 12 months of the order made against him his suit to establish his right, and obtained in that suit a decree which rightly or wrongly established his title against Shib Lal, the respondent here. That decree has become final, and I fail to see how it can be questioned in this suit, or how if this suit were otherwise maintainable any decree in this suit, which is between the same parties, could be passed which would detract from or interfere with the decree obtained by Seth Chitor Mal in his suit. Further, and apart altogether from any question arising under section 13 of the Code of Civil Procedure, there appear to me to be two grounds at least upon which this suit must fail. One of those ground is that Shib Lal, the plaintiff respondent here, having obtained in a Court of Revenue the only decree which that Court had jurisdiction to pass, seeks by this suit to have it executed by sale of immoveable property as if that immoveable property was not subject to the incumbrances of Seth Chitor Mal; in other words, Shib Lal, is seeking a sale not authorised by section 177 of Act No. XII of 1881, which enacts that the sale under that section shall be made "without prejudice to the incumbrances (if any) to which such property may be subject." The

other ground to which I allude is that no order having been passed against Shib Lal, under section 179 or section 180 of Act No. XII of 1881, by the Collector of the District, Shib Lal has no right of suit under section 181, and so far as I am aware is not given under any other section or Act the right of suit which he contends for here.

1892

SETH CHITOR
MAL
v.
SHIB LAL.

To sum up my views on this case, so far as legislation affects it or shows what was or was not the intention of the Legislature. In my opinion no Civil Court had jurisdiction to entertain this suit, and no Court of Revenue had jurisdiction to make a decree for sale of the immoveable property or a decree in execution of which the immoveable property could be sold to the prejudice of incumbrances to which it was subject. No such right of charge as is claimed here has been given or recognised in these Provinces by the Legislature, and any such charge would be at variance with the policy and intention of the Government as disclosed in its legislative enactments; and it was not the intention of the Legislature that a Civil Court should have jurisdiction to invest by declaration or otherwise a decree of a Court of Revenue with the attributes of a decree for sale such as could be passed by a Civil Court in a suit for sale under the Transfer of Property Act, 1882. Such on this subject is my opinion of the effect and object of, and of the inferences to be drawn from, legislation, so far as these Provinces are concerned.

Holding the opinion which I have above expressed as to the effect of the legislation so far as these Provinces are concerned, it is hardly necessary for me to consider the abstract question as to whether a lambardár or co-sharer who, on behalf of a person who is a proprietor within the meaning of section 146 of Act No. XIX of 1873, or on behalf of any other person, pays his arrear of land-revenue can, except by reason of a contract with such proprietor or person, obtain or be entitled to, by subrogation or otherwise, charge on immoveable property for money paid by him in satisfaction of land-revenue for the payment of which such property was liable. It is clear to my mind that a lambardár could not except by express legislation obtain the charge which the Govern-

1892
 SETH CHITOR
 MAL
 v.
 SHIB LAL.

ment has for arrears of land-revenue, for no means has been provided by which he or an assignee of such charge could enforce it. The means by which the Government can, under section 150 and the following sections of Act No. XIX of 1873, enforce its charge for arrears of land-revenue are entirely inapplicable in the case of a lambardár proceeding for the recovery of money paid by him in satisfaction of an arrear of land-revenue. So far as I am aware, the Government has no means of enforcing its charge for arrears of land-revenue as a charge upon the land other than those given to it by section 150 and the following sections of Act No. XIX of 1873.

A co-sharer to whom section 146 or section 148 of Act No. XIX of 1873 applies, who pays an arrear of land-revenue, his own share of the land-revenue, calculated as between himself and his co-sharers having been paid in due time, cannot in my opinion be treated as standing in the position of a surety to the Crown who has paid to the Crown the debt of his principal, for the land-revenue is payable out of the whole mahál and out of each and every part of it, and every co-sharer is severally in his capacity as a sharer or proprietor of a share or land in the mahál, and not in the capacity of a surety for his co-sharer, liable for the whole of the land-revenue assessed upon the mahál and for every part of it. It may be doubted whether section 69 or section 70 of the Indian Contract Act, 1872, applies to such a case, and it may be noticed that the illustration to section 69 is an example of a payment made by a person, who, so far as appears from the illustration in that section, was not bound to make it. However that may be, a right, but not such a right of suit as is contended for in this case, is impliedly, if not expressly, given to a lambardár by clause (g) of section 93 of Act No. XII of 1881, against any person who was responsible for the payment of the arrear of land-revenue through the lambardár, and to a recorded co-sharer by clause (k) of that section against a recorded co-sharer who defaults for arrears of land revenue paid on his account by the recorded co-sharer.

It appears to me that a co-sharer or a lambardár who pays an arrear of land revenue to prevent the arrest and detention under section 152 of Act No XIX of 1873, of a defaulter, or to prevent a sale under section 153 of a defaulter's moveable property, or to prevent an attachment under section 154 of a defaulter's share in which the paying co-sharer was not a co-sharer, could not, on any principal of equity or, except by express contract obtain a charge in respect of his payment, as his interest could not be affected by any process which affected only his co-sharer's liberty or property, and consequently that the broad proposition that a lambardár or other co-sharer in these Provinces who pays an arrear of land-revenue primarily due by another co-sharer obtains a charge in respect of such payment by reason alone of such payment cannot be maintained in its integrity upon any considerations depending on Act No. XIX of 1873.

1892
SETH CHITOR
MAL
v
SHIB LAL.

I fail to understand upon what principle of justice, equity or good conscience a lambardár or a co-sharer who, being liable as a debtor to Government, pays an arrear of land-revenue should be in a better position than would be a second mortgagee of the whole mahál who being in a possession paid such an arrear out of his own pocket, the income of the mahál being insufficient for the purpose. Such a mortgagee would by such a payment obtain no priority over the first mortgagee, and would only be entitled under section 72 of the Transfer of Property Act, 1882, in the absence of a contract to the contrary, to add the money so paid to the principal money of his mortgage, at the rate of interest payable on the principal, and where no such rate was fixed at the rate of 9 per cent. per annum.

A Full Bench of the Calcutta High Court in *Kinu Ram Das v. Mozaffer Hosain Shaha* (1) consisting of Mitter, Prinsep, Wilson, Tottenham, and Norris, JJ., held (Mitter and Norris, JJ., dissenting) that there is no general principle of equity to the effect that whoever having an interest in an estate, makes a payment in order to save the

(1) I L. R., 14, Cal. 809.

1892
 SETH CHITOR
 MAL
 v.
 SHIB LAL.

estate obtains a charge on the estate and, therefore, in the absence of a statutory enactment, a co-sharer who paid the whole revenue and thus saved the estate does not, by reason of such payment, acquire a charge on the share of his defaulting co-sharer. Although I have held and expressed a contrary view as regards the rights of lambardárs and co-sharers in these Provinces, I am now, after mature consideration, of opinion that my view was unsound, and that the view expressed by the majority of the Calcutta High Court is correct on general principles, and that there is no such general principle of equity. I agree with the observations in that case (I.L.R., 14, Cal. at pages 827 and 828) of Wilson, J., on the dictum of their Lordships of the Privy Council in *Nugender Ghunder Ghose v. Kaminee Dossee*.

Further, I may point out that there is no evidence on the record to show that any sale for arrears of land-revenue was imminent or threatened, or that any proclamation of sale had been issued under section 169 of Act No. XIX of 1873, or even that any sale of any immoveable property was ever contemplated by the Collector, and that Shib Lal was not as lambardár or co-sharer interested in the land or share in suit, and that if the mahál had been in danger, imminent or otherwise, of being sold under section 166 of Act No. XIX of 1873, he paid the arrear of land-revenue, not to save the land and shares in suit from being sold, but to save his own share as a co-sharer in the mahál from being sold as the share of a defaulter and part of the mahál.

The doctrine, which apparently had its origin in the Courts in Ireland, that a charge upon land may arise on the principle of Maritime Civil Salvage has, I think, been satisfactorily exploded as a principle of equity by the decisions of the English Courts in the cases of *Leslie v. French* (1) and *Falcke v. Scottish Imperial Insurance Co.* (2).

In my opinion no analogy can exist between the case of a salvor in Maritime Civil Salvage, and the case of a co-sharer in a mahál to whom section 146 or section 148 of Act No. XIX of 1873

(2) L. R., 23, Ch. D. 552.

(2) L. R., 34, Ch. D. 234.

applies, for the first principle of Maritime Civil Salvage is that no one can be a salvor entitled to salvage whose legal duty it was to do the act by which the ship or cargo was saved. A salvor is defined by Lord Stowell to be a person who, without any particular relation to the ship in distress proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of the vessel (*per* Lord Stowell, *The Neptune*, Clark, 1 Hagg. Ad. 227, 236; MacLachlan's *Merchant Shipping*, 2nd ed., p. 570). Using the word "duty" in a sense other than that of a legal duty, for the breach of which a Court could award damages, Lord Stowell in *The Waterloo*, Bird, 2 Dods. Ad., 433, 437, said: "It is the duty of all ships to give succour to others in distress, none but a freebooter would withhold it; but that does not discharge from liability to payment where assistance is substantially given." Although on principles of public policy salvage is allowed in maritime cases, I have never heard it suggested that a man who as a volunteer stops a horse running away with a cart, in which are goods of his and also goods of others liable to be damaged or destroyed, is entitled to a salvage lien, and yet according to the argument on behalf of Shib Lal such a volunteer would be entitled to a salvage lien on the horse, the cart and its contents.

Justice, equity, and good conscience are captivating terms; but before a Judge applies what may appear to him at first sight to be in accordance with justice, equity, and good conscience, he must be careful to see that his views are based on sound general principles, and are not in conflict with the intentions of the Legislature or with sound principles recognised by authority. In my opinion justice, equity, and good conscience do not require us in India to go so far afield as the Irish Courts, in order there to seek for, and thence to import into India, novel principles of equity, based on unsound analogy, and rejected as unsound by Judges of such authority as Bowen and Fry, L.JJ., and not followed by such an authority as the late Lord Justice Cotton in *Falcke v. Scottish Imperial Insurance Co.*, and which further are at variance with the Transfer of

1892 Property Act, 1882, of the Indian Legislature, and with the policy
 SETH CHITOR of the Government as disclosed in its legislative enactments.

MAJAL
 v.
 SHIB LAL.

In addition to the authorities to which I have referred, many other authorities were referred to in the course of the arguments; but as they do not show that the opinions expressed in them were arrived at after any critical examination of the legislative enactments bearing on the questions, and appear as a rule to have been based on a supposition that the novel principle, which I have mentioned, was a sound principle of equity. I have not thought it necessary to refer to them in my judgment.

On every view of this case I would allow these two appeals with costs, and dismiss the suit with costs in all Courts.

TYRRELL, J.—I fully concur in the judgment and decree of the Chief Justice.

KNOX, J.—I fully concur with the Chief Justice in the judgment and order proposed.

BLAIR, J.—I agree with the judgment and order proposed by the Chief Justice.

MAHMOOD, J.—I have had the advantage of perusing the judgment which the learned Chief Justice has prepared in this case, and the facts of the case are so lucidly stated therein that I have struck out of this judgment what I had written on that part of the cases; and, indeed, I should have omitted the rest of this judgment also, had it not been that I find myself unfortunately unable to agree in the conclusions at which he has arrived on the questions of law which arise in this case.

This being so, it is necessary to appreciate exactly the points upon which most stress was laid in the argument before the Full Bench.

Now I understand that the argument of the parties raises the following questions for determination :—

(1) Whether, with reference to the decree obtained by the plaintiff from the Revenue Court on the 7th of April 1885, the present suit is barred by s. 43 of the Code of Civil Procedure?

(2) Whether the decree obtained by the defendant Chhitar Mal against the plaintiff from the Civil Court on the 4th of September 1888, bars the present suit under s. 13 of the Code of Civil Procedure ?

1892
SETH CRITOR
MAL
v.
SHIB LAL.

(3) Whether the payment of Government revenue by the plaintiff, lambardár, on behalf of his defaulting co-sharers, such as those whose rights the defendant Chhitar Mal has purchased, gives the plaintiff a charge by way of salvage or otherwise on the defaulting shares so as to enable him to enforce it against the purchaser in execution of hypothecation decrees enforcing prior mortgages such as the defendant Chhitar Mal in this case ?

Upon the *first* of these points I agree with the lower appellate Court in the view that the principle of the ruling of Stuart, C.J., and Straight, J., in *Banda Hasan v. Abadi Begam* (1) justifies the conclusion that the present suit was not barred by s. 43 of the Code of Civil Procedure. The plaintiff's suit in the Revenue Court, which ended in the decree of the 7th of April 1885, was a suit of the nature contemplated by clause (g) of s. 93 of the Rent Act (XII of 1881), and it could not have included any such relief as is prayed for in this suit. In the first place, the Revenue Courts have no jurisdiction to enforce any such charges as the plaintiff claims in this suit, and in the second place, suits of that nature do not contemplate intervention of third parties—that is to say, persons in the position of the present defendant-appellant, Chhitar Mal, who at the time was only a simple mortgagee *without* possession and was not a co-sharer, as his purchase was not made till 1887. I may here observe in passing that the joint liability of the co-sharers of a *mahál* for payment of Government revenue arises from the provisions of s. 146 of the Land Revenue Act (XIX of 1873), which originally did not impose any such liability upon any class of mortgagees, and even in the amendment of that section by s. 12 of Act VIII of 1879 the Legislature has limited the extension of such liability, by the *explanation*, to farmers and mortgagees in *possession*. It is, therefore, clear that to the revenue suit, which ended in the

1892
 SETH CHITOR
 MAL
 v.
 SHIB LAL.

decree of 7th of April 1885, the present defendant-appellant, Chhitar Mal, could not have been made a party defendant, and if follows that the relief of enforcing a charge against him such as that claimed in this suit could not have formed part of the relief prayed for in that suit. The rule contained in s. 43 of the Code of Civil Procedure has therefore no application to the present case. And if it were necessary to pursue the subject further, I would explain in detail the principle of the Full Bench ruling of the Calcutta High Court in *Syed Emam Momtaz-ood-deen Mahomed v. Rajoomar Dass* (1), which was apparently misunderstood in *Doss Money Dossee v. Jenmenjoy Mullick* (2), but again explained in a later Full Bench ruling by Garth, C.J., in *Jonmenjoy Mullick v. Dass Money Dossee* (3). These cases related to the effect of a summary decree obtained under the special provisions of s. 53 of the Registration Act (XX of 1866), which allowed by its procedure only simple money decrees upon registered mortgage bonds, and it was held that such a summary decree would not debar the mortgagee from seeking his further remedy by enforcing his lien where the mortgaged property had passed into the hands of third parties against whom such lien was sought to be enforced. These rulings, indeed, go beyond the exigencies of this case, for there the mortgagee's remedy by the summary procedure of s. 53 of the Regulation Act (XX of 1866 was optional, and in the present case, by reason of the body of s. 93 of the Rent Act (XII of 1881), read with clause (g) of that section, the plaintiff, in his suit which ended in the decree of the 7th of April 1885, had no choice but to go to the Revenue Court with a plaint by which he could not implead the defendant-appellant, Chhitar Mal, and by which he could not seek to enforce the charge now claimed against the defendant. The procedure of the Revenue Courts under the Rent Act (XII of 1881), in suits of the character described in s. 93 of that enactment is of a summary character, excluding consideration of the claims of third parties, and the jurisdiction thus conferred upon them is necessarily of a circumscribed character. But because the jurisdiction of such Courts is circum-

(1) 14 B. L. R., 408.

(2) I. L. R., 3, Calc. 363.

(3) I. L. R., 7, Calc. 714.

scribed, it does not follow that the jurisdiction of the Civil Courts under s. 11 of the Code of Civil Procedure is totally ousted. It is of course ousted to the extent of the express provisions of the enactment, but I hold that a suit like the present, where the relief prayed for could not have been entertained by the Revenue Court, there can be no ouster of jurisdiction, and since the case is thus entertainable for adjudication upon reliefs which could not have formed part of the revenue suit which ended in the decree of 7th of April 1885, there can be no plea based upon s. 43 of the Code of Civil Procedure which would bar this action.

1892

SETH CHITOR
MAL
v.
SHIB LAL.

Upon the *second* point also, I agree with the Courts below in holding that the suit is not barred by the rule of *res judicata* as enunciated in s. 13 of the Code of Civil Procedure. The plea was based upon the Civil Court's decree obtained by the defendant, Chhitar Mal, against the plaintiff on the 4th of September 1888, but that decree has not been produced in evidence in this suits, nor has the defendant filed copies of the pleadings of the parties in that suit. He has, however, produced an attested copy of the judgment which ended in that decree, and it shows that the main point for consideration before the Court in that case was whether the present plaintiff's Revenue Court's decree of the 7th of April 1885, could be so executed by proceeding in the Revenue Court as to subject the rights purchased by the present defendant, Chhitar Mal, to sale. The Court answered the question in the negative, following the ruling of Oldfield and Tyrrell, JJ., in *Lachman Singh v. Saliz Ram* (1) and I wish to quote a passage from that judgment, as it not only deals with the point now under consideration, but will be introductory to what I am going to say upon the third and most important point in this case. Oldfield, J. said :—

“No doubt by paying arrears of revenue, which he was bound to do, the defendant would obtain a charge on the estate against all persons interested therein for the sum paid, and this has been laid down by their Lordships of the Privy Council in *Nugender Chunder Ghose v. Sreenutt-Kansine Dossee* (2), but that case is

(1) I. L. R., 8, All 384.

(2) 11 Moo., I. A. 253.

1892
 SETH CHITOR
 MAL
 v.
 SHIB LAL.

also an authority for the view I take in this case, that a charge of this nature cannot be enforced under a decree which is merely a personal decree against the judgment-debtors, against whom it was passed by a Revenue Court not competent to do more than pass a personal decree. If the defendant wished to establish a charge against the property in the hands of the plaintiffs, he should have established the same by suit against them in a Court of competent jurisdiction."

What is sought to be enforced in this suit is the very remedy of enforcement of lien which the Revenue Court could not have granted ; for, as I have already explained, it was a matter entertainable only by the Civil Court. The suit therefore is not open to the objection of any pleas *in limine* such as want of jurisdiction, or such pleas as may be founded upon the provisions of ss. 13 and 43 of the Code of Civil Procedure.

I proceed now to consider the *third* question in the case, as already enunciated by me in a somewhat concrete form with reference to the circumstances of this particular case ; but that question is the same as that which in a more concise and abstract form was referred to a Full Bench of the Calcutta High Court by Wilson and O'Kinealy, JJ., in *Kinu Ram Das v. Mozaffer Hosain Shaha* (1), in which they formulated the question in the following words :—

"Where one or two co-sharers in a revenue-paying estate pays the whole revenue in order to save, and so does save, the estate, is he entitled to a charge upon the share of his co-sharer to the extent of the latter's share of the revenue as against a purchaser ?"

In referring the question to the Full Bench, the learned Judges observed that "no such charge is given by any express statutory enactment," and to show the gravity of the question I may state here in passing that the Full Bench which had to consider the question consisted of five Judges who were not unanimous in their answer, Mitter and Norris, JJ., answering the question in the affirmative, and Wilson, Prinsep and Tottenham, JJ., answering the question in the negative. Since the same difficulty has arisen in this Court, it would scarcely be enough for me, sitting here as a member

(1) I. L. R., 14, Calc. 809.

of the Full Bench, to content myself by saying that I agree in the principles upon which the judgment of Mitter, J. (concurring in by ¹⁸⁹² SETH CHITTOOR MAL v. SHIB LAL Norris, J.) proceeded in that case. I shall therefore deal with the question, not of course as *res integra*, but at greater length than would be necessary if there was no conflict of decision.

It seems that in the argument before the Full Bench of the Calcutta High Court in the case above cited, as also in the case before Cotton, Bowen and Fry L.JJ., in *Falcke, v. Scottish Imperial Insurance Company* (1), the expression "*salvage*" or "*salvage lien*" was employed for purposes of representing a charge such as the one claimed by the plaintiffs in this suit. In the Calcutta Full Bench case, as also in the English case just mentioned, the use of the term was disapproved, since Wilson, J., in the Calcutta case, following Bowen L. J., in the English case, held that "*salvage*" or "*salvage lien*" were limited to maritime law, and that such a doctrine did not apply to any matters which did not arise out of the perils of the sea. Into the discussion of this question it will presently be my duty to enter but I may say here in passing that I agree in what has been said by Dr. Rashbehary Ghose with reference to certain legislative enactments which proceed upon the doctrine of salvage other than "*maritime*" salvage. Referring to these enactments the learned author observes :—

"These enactments rest upon a plain principle of equity, the charges created by them being recognized in most systems of law under the name of *salvage liens*, an expression not wholly useless nor absolutely misleading, and conveying, notwithstanding the recent protest of an eminent English Judge, a definite meaning, a recommendation not always possessed by some of even the most familiar terms in the English law." (*Law of Mortgage in India*, 2nd edition, page 316).

With these remarks, as I have already said, I concur, and, if it is a true proposition of our Indian law, as distinguished from the English or other systems, that the doctrine of salvage is limited to the perils of the sea, or what I may call the *maritima* salvage, then it must at once be conceded, as was held by Wilson, J., and two other

1892
 SETH CHITOR
 MAL
 v.
 SHIB LAL.

learned Judges in the Calcutta Full Bench case, following the dictum of Bowen, L.J., in the English case abovementioned, that the plaintiff must fail in this suit.

This renders it necessary for me to consider, in the *first* place, what the exact motion of the doctrine of *salvage* is in the English law, and in the *next* place to ascertain upon what principle it is based. Salvage is well defined by a modern writer on the present laws of England in the following words:—

“*Salvage* is a compensation for maritime services rendered in saving property or rescuing it from impending peril on the sea, or when wrecked on the coast of the sea or on a public navigable river or lake, where inter-state or foreign commerce is carried on. The amount of the compensation rests in the sound discretion of the Court upon a full consideration of all the facts of the case.” (*Commentaries on the present Laws of England* by Brett, Vol. II, p. 1068.)

This being so, I will, before proceeding further, and at the risk of prolixity, quote a passage from the judgment of Lord Justice Bowen in *Faelke v. Scottish Imperial Insurance Company* (1) which deals with theory of salvage in the English law. The passage runs as follows:—

“The general principle is, beyond all question, that work and labour done, or money expended, by one man to preserve or benefit the property of another do not, according to English law, create any line upon the property saved or benefited, nor even, if standing alone, create any obligation to repay the expenditure. Liabilities are not to be enforced upon people behind their backs any more than you can confer a benefit upon a man against his will. There is an exception to this proposition in the maritime law. I mentioned it because the word ‘salvage’ has been used from time to time throughout the argument, and some analogy is sought to be established between salvage and the right claimed by the respondents. With regard to salvage, general average and contribution, the maritime law differs from the common law. That has been

(1) L. R., 34, Ch. D. 234, *vide* p. 248.

so from the time of the Roman law downwards. The maritime law, for the purposes of public policy and for the advantage of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils and the fact that the thing saved was saved under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea."

1892

SETH CHITOR
MAL
v.
SHIP LAL.

That this is a correct enunciation of the English *maritime* law of salvage I have no doubt. But, with all the profound respect which is due to the dicta of Lord Justice Bowen, I may say that there is nothing by way of distinction shown or explained by his Lordship why the same principle should not apply to similar perils on the land, and perhaps of a worse nature than and perils which arise in the sea. There is no juristic reason explained in the judgment, and sitting here as Judge, bound neither by the technicalities of the English Common Law nor by technicalities of the rules of Chancery in England, I am free to ask myself the question why this doctrine of salvage lien is limited by the English Courts to perils of the sea as distinguished from the perils of the land. As an Indian Judge and a member of a Court which deals with disputes of parties living in a land the vast majority of whose inhabitants have never seen the sea, and are therefore not in a position to appreciate the dangers arising out of the upheaval of the billows of the ocean, I find it difficult to accept over questions of maritime salvage liens that any such sanctity can be attached to the perils of the sea as to place them upon a separate juristic footing from similar perils which arise on the land. As I understand Lord Justice Bowen's dictum in the case which I have cited, the man who saved a vessel from sinking would be entitled to a salvagelien because this would be a peril of the sea, but a person who saved Pompeii from destruction by the eruption of Mount Vesuvius at the risk of his life and the expenditure of his money would not be entitled to such a salvage lien, because the eruption took place on land and not in the sea, and it follows from that dictum that the dangers of the sea for purposes

1892 of the doctrine of salvage rest on a far higher footing than the
 SETH CHITOR perils of fire or earthquakes which occur upon land.

MAL
 v.
 SHIB LAL

That such is the doctrine of English law, I accept to be a true proposition, for Lord Justice Bowen, in ending the passage which I have already quoted, said, with reference to salvage as to the perils of the sea :—" No similar doctrine applies to things lost upon land, nor to any thing except ships or goods in perils at sea :—" and if I felt myself bound by the English law in administering justice in this case, I should have held as easily as was held by Wilson, J., in the Full Bench case of the Calcutta High Court, *Kinu Ram Das v. M. Zaffer Husain Shaha* (1) that the plaintiff's case in a suit of this character must fail.

But with all the respect which is due to the evolution of juristic principles by the English Courts of Justice, and with all the respect which is due to eminent Judges who have presided in those Courts, I have not before me even one authority or one judgment cited which would furnish me with any juristic reason for supposing that the perils of the sea upon which the English doctrine of salvage is based are in all conditions greater than the perils of the land. It is of course natural to suppose that in sea-girt countries like England or other maritime countries like the Ionian Islands the terrors of the sea with its storms and the billows of the ocean may present a spectacle to the inhabitants of the islands and the maritime countries with a sensation of greater sanctity and effect than much greater perils that sometimes arise on the land whether by the act of nature, by accident or by the effect of stringent legislative enactments which must be obeyed.

I do not take the instructive passage of Lord Justice Bowen's judgment in *Falcke v. Scottish Imperial Insurance Company* (2) in any sense other than showing what the English law, as a matter of fact, is upon the subject of salvage, and as such I adopt it.

But I respectfully think the English law upon the subject is an unreasonable law as far as it restricts the salutary doctrine of salvage purely to maritime salvages. I have endeavoured to ascer-

(1) L. L. R., 14, Calc. 809.

(2) L. R. 34, Ch. D. 224, vide p. 218.

tain the historical origin of this limited form by the doctrine of salvage. Sir Patrick Colquhoun's *Roman Civil Law* (s. 977, Vol. II, p. 44) has the following :—

1892
SETH CHITTOB
MAL
r.
SHIB LAL.

‘ The Rhodhians were a maritime nation in the height of prosperity long before the Romans occupied themselves with such matters. The Romans incorporated many of the Rhodhian laws into their own Codes. Harmenopulos tells us that most of these laws were very ancient, and Strabo speaks of the Rhodhians as possessing the empire of the sea. Should a ship be stranded or cast away, every one must save as much of his property as he can, as in case of a fire ; thus as has been above remarked, it is not to be inferred that he who throws things overboard for the purpose of lightening the vessel intends to abandon them after the fashion of a derelict, but is to be likened to a man overladen with too heavy a burden, who might put part of it down by the roadside and return afterwards with others to fetch the remainder.”

In the same section (977) the same learned author states :—

“ The law which regulated the question of lightening a ship under pressure of necessity was the *lex Rhodia de jactu*, which requires a passing notice in this place. It was provided in the s. 8 of that law that goods thrown overboard were not derelicts, but still belonged to the former owner, and this was the adopted maritime law of Rome. Every one who by damage to his own property on shipboard shall have saved that of another, can demand an appropriate indemnification of *salvage*, for the recovery of which an action can only be brought against the master of the vessel, who was bound to procure for the loser *salvage* from those whose goods had been preserved. The greater part of the provisions of this law relate to similar contributions and indemnifications, under certain circumstances, respecting goods thrown overboard and damage done to the vessel.”

How this rule gradually affected the English law as to wrecks is described in the next section (s. 978) of the same work, but it is needless to go into the details of that history. However, before

1892
 SETH CHITOR
 MAL
 v.
 SHIB LAL.

proceeding any further, I wish to quote a passage from another learned author, Sir Robert Phillimore, who in his celebrated work on International Law, Vol. IV, s. DCCCXXVIII, has the following :—

“ When the preservation of the ship has required the throwing overboard or sacrifice of a portion of a goods, *equity demands* that a general contribution be made by all towards a loss sustained by some for the benefit of all, and this is called in England by the name of *general average*.” And then after stating that “ the law on this subject was transplanted from the Maritime Code of Rhodes into the Roman Law,” the learned author goes on to say that, “ the principle of this rule has been adopted by all commercial nations, but with considerable variation in practice as to the kind of losses which demand its application and as to the nature of the interests compellable to contribute.” Before making any observations of my own, I wish to point out that Sir Robert Phillimore distinctly, in the passage which I have quoted, rests the English law doctrine of *general average* on equitable considerations, and it is therefore necessary to ascertain the exact scope of the notion of *general average* in English law. I again resort to Brett’s *Commentaries on the present Laws of England* (Vol. I, p. 271) where the author has the following :—

“ General average is a contribution by the owners of the ship, freight and charge to compensate the owner of a particular part of the ship or cargo, whose property was sacrificed for their common good, *ex. gr.*, a *jettison* of cargo. The whole adventure must have been in imminent danger of being lost for a right to general average to exist, for the sacrifice must have been for the general good.”

Now, whatever distinction in matters of detail may exist between *maritime salvage* and *general average*, as understood in maritime law, one thing is certain, that failing statutory provisions, they must rest upon one common footing. The origin of these liens appears to be more ancient than any statute law in England, for these notions are based, as the authorities show, upon the customs of the inhabitants of Rhodes, an island of Asiatic Turkey, near the

coast of Asia Minor, 36 miles long, with a breadth of 18 miles at its widest part and consisting of an area of 420 square miles, and situate in the Mediterranean Sea, so close to the islands of Greece that it must have been affected by the Greek superstition as to *Oceanus*, "A powerful deity of the sea, who, according to Homer, was father of all the gods." The Romans, as the History of law shows, borrowed these doctrines from the Rhodians, and from the Romans the doctrine was borrowed by England along with other maritime countries with certain variations and limitations which Sir Robert Phillimore has explained.

1892
 SETH CHITTOB
 MAL
 SHIB LAL.

The question then is, whether we in India are to hold that, because England, with her sea-girt shores, has chosen to adopt the Rhodian principle of salvage, limiting it to the perils of the sea, and excluding the doctrine of salvage as resting upon a higher footing of equity than the perils arising out of the waves of the ocean, we are bound to adopt such a limitation, which, I respectfully think, is based in its historical origin on ancient maritime superstition.

My answer to the question must necessarily rest upon my ascertaining first of all what my duty as a Judge is under the law which I am called upon to administer. I agree with what was said by Wilson, J., in *Kinu Ram Das v. Mozaffer Hossain Shaha* (1) that there is no "*express statutory enactment*" providing a charge such as that claimed in this case. But, whilst conceding this, I may also observe in passing that my endeavours have been futile in ascertaining whether the English law of *maritime salvage*, restricted as that salvage is to the perils of the sea, had its origin in any statute law in England. Nor have I been able to ascertain whether the common law doctrine of implied contracts, with all its requisite fictions as to request, had its origin in any statute law.

Now, the provisions of s. 37 of the Civil Courts Act (XII of 1887), reproducing as they do much earlier provisions of statute law, are clear in laying down that, with the exception of certain branches of the Hindu and the Muhammadan Law, the Courts are to follow legislative enactments, and in cases not provided for by such enact-

(1) I. L. R., 14, Cal. 809.

1892
 SETH CHITOR
 A. AL
 v.
 SHIB LAL.

ments, "the Court shall act according to justice, equity and good conscience." This much was indeed conceded by Wilson, J., in the Full Bench case just mentioned; but the learned Judge went on to say towards the end of his judgment:—"We are not, under these circumstances, in my opinion, at liberty to treat the matter as if it were *res integra*, and under the name of equity and good conscience to adopt whatever rule we think most likely to work well."

It is perfectly true that in dealing with questions not covered by *express* legislative provisions the Judge must not forget that he is a Judge and not a legislator. But it is equally true that a Judge sitting in one country is not to administer the laws of another country. To the English system of jurisprudence, common law and the principles of equity administered in the Courts of Chancery in England India owes a vast debt of gratitude for the improvements in the administration of justice. How far the principles of the English system have been imported into India is apparent not only from our Statute book, but also from the vast body of decided cases, which I may describe as judge made law. Notions of justice, equity and good conscience are necessarily incapable of exact and exhaustive definition, and in administering them the Judge has to take exceptional care whether he is or is not importing foreign notions too far, or giving too much preference to the notions of equity in one country over the notions of another.

I have already endeavoured to describe what in my opinion is the origin and history of *maritime* salvage in England. I have also said that I have been unable to find in the English cases cited any juristic exposition of the reasons why *maritime* salvage should be the only kind of salvage recognized by the courts. Lord Justice Bowen, in the passage which I have already quoted from his judgment in *Falcke v. Scottish Imperial Insurance Company* (1) states that the special supremacy of maritime salvages over any other class of salvages that may exist (notwithstanding their repudiation by the English law) rests upon public policy for the advantage of trade and the nature of sea perils. That such

(1) L. R. 34, Ch. D., 234 *vide* p. 248.

a rule rests upon sound considerations of equity I have no doubt. But why that equity should stop at the sea-shore, I frankly and respectfully confess I am unable to conceive, for I cannot help feeling that doctrines of equity are no more governed by the peculiarities of the sea than by the peculiarities of the land. A legislative enactment may indeed modify the operation of equitable doctrines by restricting them either to the sea or to the land, but, as I have already said, in British India no such legislative interference has taken place, and so far as this part of the country is concerned, the broad principles of equity, justice and good conscience must prevail under statutory mandate, regardless of foreign systems, though of course they may be referred to for purposes of comparison.

1892
 SETH CHITOR
 MAL
 v,
 SHIB LAL.

In this connection it becomes necessary to investigate whether the doctrine of salvage itself (irrespective of any considerations as to lien) has not a broader foundation in equity than the perils of the sea, or the grounds restricted by the English *maritime* law of salvage. I will quote from a jurist of as great eminence as Jeremy Betham :—

“A surgeon has bestowed his services upon a sick man who had lost his senses and who was not in a condition to ask for assistance. A depository, though not requested to do so, has employed his labour, or has made pecuniary advances for the preservation of a deposit. A man has exposed himself in a fire to save valuable property or to rescue persons in danger. The effects of a passenger have been thrown overboard to lighten the ship and to preserve the rest of the cargo. In all these cases, and in a thousand others which might be cited, the laws ought to insure a recompense equivalent to the value of the services. This title to indemnity is founded upon the best reasons. Grant it, and he by whom it is furnished will still be a gainer; refuse it, and you leave him who has done the service in a condition of loss. It is a promise of indemnity made beforehand to every man who may have the power of rendering a burdensome service, in order that a prudent regard to his own personal interest may not come into opposition with his benevolence.” And then the author, whilst laying down

1892
 SETH CHITOR
 MAL
 v.
 SHIB LAL.

this general juristic foundation of the rule of equity goes on to say :—" Three precautions must be observed in arranging the interest of the two parties. *First* to prevent a hypocritical generosity from converting itself into tyranny and exacting the price of a service which would not have been accepted had it not been supposed disinterested. *Secondly* not to authorise a mercenary zeal to snatch rewards for services which the person obliged might have rendered to himself or have obtained elsewhere at a less cost. *Thirdly* not to suffer a man to be overwhelmed by a crowd of helpers who cannot be fully indemnified without counterbalancing by an equivalent loss the whole advantage of the service." (Bentham's *Theory of Legislation*, Hildreth edition, pp. 191-92.)

Another passage from a more modern jurist needs quotation before I proceed to discuss the Indian law. I quote from Professor Holland's work on jurisprudence (p. 169) :—

"According to Roman law a *negotiorum gestor*, or person who volunteered to render some necessary service to property in the absence of its owner, had a claim to be compensated by the owner for the trouble he had taken, and the owner had also a claim for any loss which had resulted from the interference of the *negotiorum gestor*. Of a similar character are the rights given by English law to the salvors of ships in distress and recaptors of ships which have been made prize by the enemy, and to those who have supplied necessities to persons who, being lunatics or in a state of drunkenness, were incapable of binding themselves by contract."

I have quoted from Jeremy Bentham and Professor Holland for the purposes of maintaining the proposition, which I hold, that in jurisprudence the fundamental doctrine of salvage is neither limited to the perils of the sea nor to any particular class of perils, but that it is based upon sound foundations of the doctrines of equity. *Maritime salvage*, as understood in the English law, is only a *species* of the *genus*, and if England or other maritime countries restrict themselves to one or more species of salvage it does not follow

that other countries which are not maritime, like the territories over which this Court exercises jurisdiction, should limit themselves to any species of salvage adopted by maritime countries to the exclusion of other species of salvage falling under the general genus of the equitable doctrine.

1892

SETH CHITPOR
MAL
v.
SHIB LAL.

I will now consider how far this fundamental principle has been accepted by the Indian Legislature. In order to avoid the complications arising out of the fictions of English law in such cases, Sir Fitz-James Stephen's Contract Act (IX of 1872) in chapter V, deals with what are called implied contracts in English law under a general category of "*certain relations resembling those created by contract.*" The first of these sections (s. 68) deals with necessities supplied to persons incapable of contracting, and the next section is more to the point here, because it lays down the general proposition of equity as much as of law, "that a person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other." That the doctrine is shared by the English common law with equity is certain, and the difference, if any, lies in the fact that the common law relies upon fictions of implied requests, while equity jurisprudence is independent of such fictions. This section 69 of the Contract Act is specially important in this case because of the *Illustration* which is appended to it, which runs as follows:—

"B holds land in Bengal on a lease granted by A, the zamindár. The revenue payable by A to the Government being in arrear, his land is advertized for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of B's lease. B, to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from A. A is bound to make good to B the amount so paid."

I shall later on have to refer to this s. 69 of the Contract Act, as also to the *Illustration* which I have just quoted. But meanwhile I must proceed to show that the next section (s. 70) of the chapter deals with the obligation of persons enjoying benefits of

1592 non-gratuitous acts, and to that section is appended *Illustration*
 SETH CHITOR (b) which runs as follows :—
 MAL “A saves B’s property from fire. A is not entitled to compen-
 v. sation from B if the circumstances show that he intended to act
 SHIB LAL. gratuitously ”

I have quoted this in passing to show that salvage from the dangers of the fire, as distinguished from the perils of the sea, may possibly be recognized, though the *Illustration* limits itself to the case of a salvor who “intended to act gratuitously,” and though there is no *Illustration* appended to the section applicable to the case of a person who, though a volunteer, does *not* intend to act gratuitously, but incurs risk of life and expense to save property from imminent danger from fire. The remaining two sections of the chapter of the Contract Act (ss. 71 and 72) are unimportant for the considerations of the questions which arise in this case.

In order to guard against being misunderstood I must here observe that in discussing the questions from Jeremy Bentham and Professor Holland, as also the sections of the Contract Act, I have used the word *salvage* and *salvor* in their broad juristic sense, as distinguished from maritime salvage with its peculiar restrictions, incidents and rules. Further, I have used the words as *not necessarily* implying a *lien* upon any specific property, so that, according to my notions, there may be a right of simple salvage *without* a lien and also a salvage *with* a *lien*. I must also add that in using these terms I bear in mind the distinction between a mere volunteer who officiously renders service, or incurs expense to save the property of another, and a person who in order to save his own property makes payments which another is bound by law to pay to save his property.

Bearing these distinctions in mind, it would be a useless task for the purposes of this case to enter unto a disquisition as to the question in what cases a mere volunteer may be entitled to simple salvage without lien, and in what cases he would be entitled to salvage with lien. It is enough to say that these matters in any case must depend upon some doctrine of equity, for the English

common law theory of implied requests has, I hope, been abandoned by jurists by this time as a fiction.

1892

SETH CHITOR
DIAL
v.
SHIB LAL.

What we are concerned with here is not the case of a mere volunteer who acts officiously, but the case of a person who, impelled by necessity under the stringent rules of the revenue law, has made payments the default of which would imperil not only his own property but also the property of others. The question being thus limited, it is important to ascertain the exact nature of the peril from which the plaintiff saved the property in suit against which he seeks to enforce his charge, which I call salvage lien. The statute law upon the subject is clear so far as it delineates the nature of the peril and the liability. S. 146 of the Land Revenue Act (XIX of 1873) provides that "in the case of every *manál* the entire *mahál* and all the proprietors jointly and severally shall be responsible to Government for the revenue for the time being assessed on the *mahál*." The next (s. 147) provides as to the times and places for payment of such revenue, and s. 148 declares that any sum not so paid becomes thereupon an arrear of revenue, and the persons responsible for it become defaulters." Then follows s. 149, which lays down that "a statement of account certified by the *Tahsildar* shall be *conclusive evidence* of the existence of the arrear, of its amount, and of the person who is the defaulter. This seems drastic enough, conferring as it does upon the certificate of an executive officer the importance of conclusiveness which it would not enjoy in a Court of justice under the ordinary rules of evidence. What follows is even more important and more drastic, namely, the provisions of s. 150, which I will quote in full, relating to process for recovery of arrears of revenue. The section runs as follows :—

An arrear of revenue may be recovered by the following processes :—

- (a) by serving a writ of demand (*dastak*) on any of the defaulters;
- (b) by arrest and detention of his person;

1892

SETH CHITOR

MAL

v.

SHIB LAL.

- (c) by distress and sale of his moveable property ;
- (d) by attachment of the share or *patti* or *mahál* in respect of which the arrears is due ;
- (e) by transfer of such share or *patti* to a solvent co-sharer in the *mahál* ;
- (f) by annulment of the settlement of such *patti* or the whole *mahál* ;
- (g) by sale of such *patti* or of the whole *mahál* ;
- (h) by sale of other immoveable property of the defaulter."

I will not here discuss the question whether these perils are not greater than the perils of the sea, or at least equally great to invoke the aid of equity, which must necessarily be, even in ancient times, the foundation of the doctrine of salvage and general average as understood by the maritime countries of Europe. A sinking ship may sink if the salvor does not appear, but it may also escape sinking even if the salvor was not there, and even if there did not choose to run the risks and incur the expense of saving a sinking vessel by offering his officious services. But a joint estate such as that contemplated by s. 146 in our zamíndári tenures must sink (not unlike a ship into the depth of the ocean) into vanishment by dint of the law and its drastic rules as contained in s. 150 of the enactment. Passing by the peril indicated by clause (b) of that section—namely, or "arrest and detention of his person" (which I suppose would not be regarded as wrongful confinement, especially as the *Tahsildar's* certificate under s. 149 as to the existence of the arrear and of its amount would be conclusive evidence), I refer to the peril indicated in clause (g) of the section and also by clause (h) which follows it.

The point contemplated by clause (g) of s. 150 is represented by what may happen under s. 166 of the Act, the body of which section I wish to quote, leaving out the provisos, which have no application to this case. The section itself prescribes the following rule :—

"When an arrear of land revenue has become due and the Collector of the district is of opinion that the other processes herein-

before provided are not sufficient for the recovery of such arrear, he may, in addition to, or instead of, all or any of such other processes, and subject to the provision hereinafter contained, and with the previous sanction of the Board, sell by auction the *patti* or *mahál* in respect of which such arrear is due."

1892

SETH CHITOR
MAL
v.
SHIB LAL.

Then comes the most important section of the enactment for the purposes of this case, of which I must quote the body, leaving out again the latter part of it, which has no application to this case. Referring to the preceding section, namely, s. 166, which I have already quoted, the enactment in s. 167 goes on to say:—

"Land sold under the last preceding section shall be sold *free of all incumbrances*, and all grants and contracts previously made by any person other than the purchaser in respect of such land shall become void as against the purchaser at the auction sale."

These provisions of law leave no doubt in my mind that the Legislature, for reasons of public policy and public weal, rendered land-revenue payable by zamindari estates the *first and most paramount* charge upon the land, that in order to secure its punctual payment especially drastic provisions have been made, to such an extent that the effect may be briefly stated to be that neither the person nor the property of the zamindar can escape serious jeopardy whenever default of the payment of revenue takes place. Drastic as these provisions may seem at first sight, they are based upon sound public policy and principles of good government in an agricultural country like India. Historically these provisions, which are sometimes reproachfully called oppressive, do not owe their origin to the British rule, but are traceable to the principles of land revenue administration inaugurated by the Emperor Akbar, who has well been called the Muhammadan Augustus Cæsar of India. The British rule in adopting and improving those principles has proceeded upon sound considerations of public policy and good government quite as important as the public policy of maritime salvage and they have worked with success.

I have dwelt upon this aspect of the matter at such length in order to point out that Lord Justice Bowen in his judgment, from

1892
 SETH CHITOR
 MAL
 v.
 SHIB LAL.

which I have quoted, does not rest the doctrine of *maritime* salvage upon any higher footing than "the purposes of public policy and the advantage of trade," and to these he adds "the nature of sea perils and the fact that the thing saved was saved under great stress and exceptional circumstances." Now, this being so, I hope I have said enough to indicate that whilst for maritime countries whose manufactures and commerce depend largely upon the safety of ships and cargo, so as to give a good foundation for rendering such safety an exception to the general rule, in an agricultural and non-maritime country, like the territories within the jurisdiction of this Court, similar considerations of public policy suggest that the rules of equity upon which in their origin the doctrines of maritime salvage and general average are based should be applied to promote the security which the state possesses under the law for collection of land revenue. That security enhances in proportion to the security given to the *lambardār* for recovery of money paid by him as arrears of Government revenue on behalf of his defaulting co-sharers. I wish to say again that in this case no exigency arises to deal with the case of a mere volunteer, but with the case of a person such as the plaintiff, who in order to obey the drastic rules of law as to the collection of land revenue not only saved himself but also the property and persons of his defaulting co sharers. I find myself unable to understand why under such conditions the position of a valvor (I again use the word in its broadest juristic sense) such as the plaintiff should be rested upon a lower footing than that of a salvor from the perils of the sea, who officiously and even without the fiction of implied request saves a ship from sinking.

It has been urged, and I think the argument must be carefully considered, that whilst the statute law as contained in the Land Revenue Act (XIX of 1873) contains drastic rules for collection of land revenue, imperilling the liberty and property of the owner in a joint zamindāri estate, it is totally silent as to any lien in favor of the *lambardār* or other co-sharer who makes payment of Government revenue on behalf of his defaulting co-sharers, thus saving them and their property from the drastic consequences contemplated by s. 150

of the Act. This is so, and upon this circumstance it has been ingeniously contended that the only remedy which the law awards to a salvor (I again use the words in its broad juristic sense), such as the plaintiff is provided by clause (g) or clause (k) of s. 93 of the Rent Act (XII of 1881), and that since that enactment neither empowers the Revenue Court to deal with questions of lien, nor can such decrees as the plaintiff obtained on the 7th of April 1885, against his defaulting co-sharers be executed as decrees enforcing such liens, therefore the Legislature intended to abrogate the doctrines of equity which, independent of legislative enactment, exist as a rule of decision unless they are expressly abrogated.

1892
SETH CHITTOOR
MAL
v.
SHIB LAL.

It is perfectly true, as I have already said, following the doctrine of Wilson, J., in the Full Bench case of *Kinu Ram Das v. Mozaffer Hosain Shaha* (1) that "no such charge is given by any express statutory enactment." Whatever enactments Wilson, J., had to consider with reference to Lower Bengal, the same observation applies also to our statute law—namely, the Rent Act (XII of 1881) and the Revenue Act (XIX of 1873).

But what are we to gather from the silence of the Legislature? As I understand the rules of the interpretation of statutes, there is no more reason for holding that the Legislature by its silence intended to abrogate any doctrine of equity than there would be for holding that there is no law of torts in British India because the Legislature has not yet enacted upon the subject. And one thing is certain, that so long as s. 37 of the Civil Courts Act (XII of 1887) is allowed to stand in the Statute book of the land (as I hope it will always do), the rule of "*justice, equity and good conscience*" must apply to all cases where there is no legislative enactment one way or the other. Further, that rule, as I understand it, does not mean that we are to disregard the special conditions of the country where it is applied, the principles upon which the laws of that country proceed, and I have no doubt that it does not authorise the importation in a rigid form either of the common law of England or any technical rules of the Courts of Chancery there. Much less is it possible for me to hold

(1) I. L. R., 14, Calc. 809, vide p 812.

1892
 SETH CHITOR
 MAL
 v.
 SHIB LAL.

that the limitations imposed by the maritime law of England or any other maritime country (partial as such countries naturally must be towards attaching importance to sea perils and perils to commerce) upon the general doctrines of equity (which are as independent of the breezes of the ocean as of the hot winds of India) are to be bodily imported into an agricultural country such as this part of India.

It is now important, before I conclude to discuss the case law upon the subject, taking the judgments of Mitter, J., and Wilson, J., in the Full Bench case of *Kinu Ram Das v. Mozaffer Hosain Shaha* (1) as the starting point of such a discussion. I say so because in that case the point now under consideration was exactly the point then under consideration, and the Full Bench of five Judges was divided by a majority of three against two, one of the learned Judges of the majority resiling from the views which he had on former occasions expressed in a judgment of his own.

Under these conditions I cannot refrain, at the risk of prolixity, from quoting a whole passage from Dr. Rashbehary Ghose's *Law of Mortgage in India* (2nd ed., p. 318), not only because I fully concur in it, but also because it will be introductory to what will follow in this judgment. The learned author says:—

“Co-parcenary being the rule in India, it is certainly very desirable that the rights and liabilities of co-parceners should be clearly defined, and yet there are perhaps few portions of Anglo-Indian law which are so deservedly open to the reproach of uncertainty. I do not refer here to matters which must be governed by the personal law of the parties, but to those altogether outside the pale of that law and regulated either by statute or by the general principles of justice, equity and good conscience, which ‘high-sounding phrases’ only too often mean an exact reproduction and not a careful adaptation of English law. The Indian Legislature has, it is true, occasionally in dealing with certain special matters embodied in the Statute book some of the general principles of equity, but the result of such fragmentary legislation has been not to assist but

(1) I. L. R., 14, Calc. 809, *vide* p. 312.

rather to embarrass our judges in applying such principles in analogous cases not governed by statute law. A complete code artistically arranged is, no doubt, a triumph of Legislative skill. But a sincere, and indeed fervent, advocacy of legislation proper, as distinguished from judge-made law, is perfectly consistent with a wholesome distrust of the beneficial effect of piece-meal legislation, or, as it has been sometimes irreverently called, legislative tinkering. I cannot find a better illustration of what I mean than the recent case of *Kinu Ram Das v. Mozaffer Hosain* (1) in which a majority of the judges came to the conclusion that a part-owner is not entitled to a charge upon the share of his co-sharer for land revenue paid by such co-sharer as against a purchaser whether with or without notice. It seems to me extremely doubtful, however, whether this conclusion would have been arrived at if the matter had been free from the entanglement created by the provisions of an Act, which, while laying down the procedure regulating sales of arrears of revenue, incidentally gives a right of this kind to a mortgagee, but is wholly silent as to the rights of a part-owner. The inference which was drawn by a majority of the learned judges from the silence of the legislature was that a mortgagee alone was entitled to the benefit of a lien."

Now it is important to consider why in the Calcutta Full Bench case *Wilson, J.*, for whose rulings I have always entertained high respect, limited the lien to the case of a mortgagee only. He had before him the Bengal Revenue Sales Act (XI of 1859), and the latter part of his judgment is devoted to the interpretation of s. 9 of that enactment, which, whilst declaring a lien in favor of a mortgagee, is silent as to any such lien in favor of co-sharers paying arrears of revenue on behalf of the defaulters. He had no doubt in his mind the maxim *expressio unius est exclusio alterius*, and and then applying the maxim to the enactment before him arrived at the conclusion that because a lien was expressly declared in favor of mortgagees, and no such declaration was made in favor of co-sharers, therefore no such lien in favor of the latter existed. In this view he was confirmed by what he says:—"The corresponding

1892
SETH CHITOR
MAL
v.
SHIB LAL.

(1) I. L. R. 14, Calc. 309.

1892
 SETH CHITOR
 MAL
 v.
 SHIB LAL.

s. 9 of Act I of 1845 was in similar terms, except that it did not contain the last clause about lien." As to so much of his judgment, therefore, as proceeds upon the interpretation of statutes applicable only to Lower Bengal, much need not be said, because those enactments are not in force in this part of the country. What is important to consider are his views as to the general principles upon which his judgment proceeds. The learned judge, after referring to the enactments, concedes an important principle when he says :—

"It could not of course be contended that an enactment which purports expressly to confer a narrow and limited right, of necessity excludes a larger right, if the existence of the larger right is clearly established apart from the special enactment." So far I fully concur with the learned judge, and it is important to consider why he did not act upon that general principle. As a qualification of that general principle he goes on to say :—

"But where the existence of a larger right is not clear, but highly doubtful. I think the express creation of the narrower right tends strongly to negative the existence of the larger."

Now on this part of the judgment I wish to make only two observations with due respect. *First*, that the learned judge in making the observation as to the absence of lien in the nature of salvage such as was claimed in that case, had most probably in his mind the somewhat unqualified dictum of Lord Justice Bowen in *Fulke v. Scottish Imperial Insurance Company* (1) that "no similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea." That this was so is apparent from what Wilson, J., said with reference to the English case just cited. In the earlier part of his judgment he said: "In the latter of these cases the doctrine of what has been called salvage lien acted upon in some Irish cases, is, I think, authoritatively rejected." But it must be remembered that Lord Justice Bowen was laying down a doctrine of *maritime* law in a maritime and commercial country like England, that there is nothing in his judgment to show that

(1) L. R. 34, Ch. D. 234 *vide* p. 249.

he intended the rule which he was laying down to be a rule of universal application to all countries and in all conditions of the population of those countries; nor do I think I am going too far in undertaking the risk of saying that in all probability there was nothing farther from Lord Justice Bowen's mind when he delivered his judgment than the perils to ownership of zamindari estates under the law in our non-maritime and agricultural India.

1892
SETH CHITOR
MAL
v.
SHIB LAL.

The *second* observation, which I make with equal respect, relates to the use of the expression "the express creation of the narrower right" employed by Wilson, J., in the passage which I have quoted. It amounts, I respectfully think, to begging the question, because, according to my humble opinion, the declaration of any right by statute does not abrogate any other existing right by mere implication, and to say that such a right did not exist in equity before the passing of any particular enactment, is to assume the foundation of a contested argument. And I may say that in that very case Mitter, J., with the concurrence of Norris, J., has shown why such an assumption is unassumable.

I have already stated how upon this point the Full Bench of the Calcutta High Court was divided. I have repeatedly perused the judgment of Mitter, J., on the one hand, and the judgment of Wilson, J., on the other as expositions of two opposite views. The judgments exhaustively deal with the case-law upon the subject, and it would be a work of a supererogation to refer to the numerous cases which were discussed by those learned judges, and I will therefore refer only to more prominent ones among them. Most important of all is the dictum of the Lords of the Privy Council in *Nugender Chunder Ghose v. Sreemutty Kaminee Dossee* (1) in which Lord Romilly, in delivering the judgment of the Privy Council, made the following observation:—

"Considering that the payment of the revenue by the mortgagee will prevent the *Talook* from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person

(1) 11 Moo., I. A., 241.

1892
 SETH CHITOR
 MAL
 v.
 SHIB LAL.

who had such an interest in the *Talook* as entitled him to pay the revenue due to the Government and did actually pay it, was thereby entitled to a charge on the *Talook* as against all persons interested therein for the amount of money as paid."

This dictum of their Lordships of the Privy Council was interpreted in *Syed Enayat Hossein v. Muddun Moonee Shahoon* (1) by Markby and Mitter, JJ., to be comprehensive enough to lay down a broad principle of salvage lien in favor of co-sharers of zamindari estates, who by payment of Government revenue on behalf of their defaulting co-sharers saved the whole *mahál* from revenue sale. This interpretation, and the principles which it lays down, was followed in the Calcutta High Court by other judges, McDonell, Field, Miclean, Jackson, Tottenham and White, JJ., in the various cases referred to by Mitter, J., in his judgment. In this Court the same interpretation was adopted by Oldfield, J., with the concurrence of my brother Tyrrell in *Lachman Singh v. Selig Ram* (2) and by me in *Bhup Singh v. Gulab Rai* (3) which has not been published in the official Law Reports. The interpretation and principle was however doubted by Pontifex, J., in an *obiter dictum* which he delivered in *Kristo Mohinee Dossee v. Kaliprasanno Ghose* (4) with the concurrence of Garth, C. J. Thus the question of the interpretation of Lord Romilly's dictum and the principle which it lays down became the subject of serious consideration in the Calcutta Full Bench case, and with all due respect to the judgment of Wilson, J., in that case, I may say that I adopt the views of Mitter, J., as to the scope and interpretation of the dictum for the reasons which he has fully explained in his judgment, among them being the significant circumstance that whilst in the course of the argument before the Full Bench in the Calcutta case it was asserted that Lord Romilly, then Master of the Rolls, "in deciding cases in his own Court has disapproved of the doctrine which it is contended has been laid down by the dictum in question," no case was cited to justify such an assertion. Further, the view of Mitter, J., as expressed in the Full Bench case are in full accord with the views hitherto

(1) 14 B.L.R., 155.

(3) *Weekly Notes* 1886, p. 269, *vide* p. 273.

(2) I.L.R., 8, All. 334, *vide* p. 386, (4) I. L. R., 8, Calc. 402, *vide* p. 419.

entertained as to that dictum by this Court in the cases to which I have already referred, and nothing in the argument addressed to us in this case enables me to adopt a different view.

1892
SETH CHITOR
MAL
v.
SRIE LAL.

I will now pass on to the consideration of the question how far the other Courts have accepted the principle upon which the judgment of Mitter, J., with the concurrence of Norris, J., proceeded in the Calcutta Full Bench case. So far as the late Sadr Diwani Adalat of Calcutta is concerned, I think it is enough to say that I have perused the cases cited by Wilson, J., and Mitter, J., in their judgments, and I respectfully think that they are not helpful either one way or the other as authorities upon the equitable doctrine of salvage lien now in question, which does not appear to have been urged or argued in those comparatively ancient cases. Similar remarks apply to the rulings of the late Sadr Court of these Provinces.

Coming then to more modern times, it is important to ascertain how the case law now stands in the four High Courts established by Royal Charter in British India. The state of the case law in the Calcutta Court is best represented by the Full Bench case of *Kinnu Ram Das v. Mozaffer Hossain Shaha* (1) to which such frequent reference has already been made, with the result that in a Bench of five judges the opinions were so divided that the majority is represented by what I may respectfully call the casting vote of Tottenham, J., who explained that he had altered his opinion adopted in earlier cases. In Bombay, Sargent, C.J., and Birdwood, J., in *Achut Ram Chandra Pai v. Hari Kamti* (2) having before them some of the Calcutta cases, dissenting from the principle upon which the doubts of Pontifex, J., and the judgment of Wilson, J., (in the Calcutta Full Bench case proceed) went on to say:—

“This distinction, however, does not appear to us to affect the principle enunciated in *Nugender Chunder v. Sreemutty* (3) viz., that such payments are in the nature of salvage payments, and which is also the ground on which the decisions in the Irish cases and in

(1) I. L. R., 14, Cal. 809. (2) I. L. R., 11, Bom. 313 vide p. 318.

(3) I. L. Moo., I. A. 241.

1892 *Shah Idrus v. Pithal Rakhmajī* (1) proceed. The payment of the assessment by the part owner is by a person entitled to pay it, and who does so, *ex hypothesi*, under circumstances which make it necessary in order to save the estate for himself and co-owners, and in either view of such payment, he becomes equitably entitled to a charge on the whole estate as against the other co-sharers, and if this is so the mere circumstance that he has no existing charge on their shares at the time would appear to be no sufficient reason, in equity, justice and good conscience, for not allowing him to realize the payment from the shares of his co-owners for their respective quotas. The judgment of Fry., L. J., in *Leslie v. French* (2) doubtless shows that the question as to the effect of analogous payments in England in creating a charge on the other interests which share in the benefit of it is still far from settled, although there are many cases which support the above principle; but, however that may be, we think that the Calcutta decisions to which we have referred as recognizing a charge in those cases in which the assessment is paid by a part owner to save the estate, are in accordance with equity, justice and good conscience, and should be followed in this country."

SETH CHITOR
MAL
v.
SHIB LAL.

I have quote this passage *in extenso* because the Bombay High Court, so far as I am aware, has never departed from the principles which it thus enunciated.

I will now consider how the Madras High Court has dealt with similar principles. In *Sheshagiri v. Pichu* (3), Kernan, J., made observations which I wish to quote, as they represent how the law stands in that Court upon these matters of principle. The learned judge said:—

"The lands of defendant No. 4 and of the plaintiff are both liable to a common burden, neither of them can get his land free from the claim for revenue without paying the amount due on the whole lands: *Secretary of State for India v. Narayanan* (4). It would be against equity and good conscience that the common burden be

(1) Printed judgments for 1879, p. 407. (3) I. L. R., 11, Mad. 452, *vide* p. 454.

(2) L. R., 23, Ch. D. 564.

(4) I. L. R., 8, Mad. 130.

thrown exclusively on either lot of land or on either of the parties.

1882

This subject was much discussed by a Bench of five judges in Calcutta: *Kinu Ram Das v. Mozafer Hosain Shaha* (1). In that case many authorities were considered, and by a majority of three judges to two it was decided that a plaintiff in the same position as the plaintiff here was not entitled to a decree that the land of the defendant was subject to a charge to repay the defendant's share of the common liability for rent paid by plaintiff. I agree with the opinion of the minority for the reasons expressed by Mr. Justice Mitter in his judgment."

SETH CHITTO
MAL
SHIB LAL.

The learned judge then went on to refer to some other cases, and the dicta of Mr. Justice Story in his renowned work on Equity Jurisprudence. These I need not refer to in detail, but I may state that Muttusami Ayyar, J., who was associated with Kernan, J., in that case, in expressing his concurrence, expressly stated that he was inclined to agree with the minority of the Full Bench of the Calcutta High Court in *Kinu Ram Das v. Mozafer Hosain* (1). As against this view, however, a recent case of the Madras High Court—*Manikachella v. Shudachella* (2) has been referred to. That case, so far as the report shows, was heard by Mr. Justice Parker, sitting as a single judge, and I may say, with all due respect and without any remarks as to the interpretation of the statutes referred to in his judgment, that that judgment is so laconic that it has not been instructive to me as to whether or not the learned judge intended to rule one way or the other as to the doctrines of equity which Kernan and Muttusami Ayyar, JJ., dealt with in *Sheshagiri v. Pichu* (3).

I now come to the state of the case law in this Court itself. In *Lachman Singh v. Salig Ram* (4), Oldfield, J., with the concurrence of my brother Tyrrell, said:—

"No doubt by paying arrears of revenue, which he was bound to do, the defendant would obtain a charge on the estate against all persons interested therein for the sum paid, and this has been laid

(1) I. L. R., 14, Calc. 809. (3) I. L. R., 11, Mad. 452, *vide* p. 454.

(2) I. L. R., 15, Mad. 258. (4) I. L. R., 8, All. 384, *vide* p. 286.

1892
 SETH CHITOR MAL v. SHIB LAL. down by their Lordships of the Privy Council in *Nugender Chunder Ghose v. Sreenuttu Kaminee Dossee* (1).” Referring to this case, I made certain observations in *Bhup Singh v. Gulab Rai* (2), which I wish to quote here, as they rest in principle upon the same doctrine of salvage lien as this case, with this distinction of detail, that whilst in that case the party claiming lien was in possession and defendant, in this case the party seeking to enforce such lien is not in possession and is plaintiff in the suit. This difference of detail does not alter the applicability of the doctrine, as will appear from what I said in that case. After referring to the ruling of Oldfield and Tyrrell, JJ., in *Lachman Singh v. Salig Ram* (3), I said :—

“ Here the defendants have already purchased the property in execution of a decree which was passed for money advanced by their father on behalf of Dhan Kuar, in payment of the arrears of revenue due by her in respect of this property ; and the question is not whether any decree held by them can be so enforced as to enforce the charge, but the point is, whether they, being in possession, can claim that any sale which may take place in enforcement of the plaintiff’s mortgage, shall be subject so the extent of the money paid as Government revenue on behalf of Dhan Kuar. I am of opinion that they are entitled to claim that to the extent to which their purchase contributed to pay off the revenue due on the estate which they have purchased, they hold a charge which cannot be defeated by any sale which may take place in enforcement of the plaintiff’s lien decreed on the 14th of August 1882. This view is consistent with the principle upon which the cases already referred to by me proceed, and I respectfully think that the doubts which Pontifex, J., expressed in the case of *Kristo Mohinee Dossee* (4), as to there being no equity in such cases, are explainable by the doctrine upon which courts of equity allow lien in respect of advances in the nature of salvage. No doubt the general rule is, that a person who spends money upon the property of another, cannot by that fact itself acquire a lien upon such property, unless, having some interest in that property, he, in order to save that interest

(1) 11 Moo., I. A., 241.

(3) I. L. R., 8, All. 384.

(2) *Weekly Notes* 1886, p. 269, *vide* p. 273. (4) I. L. R., 8, Calc. 402.

expends money which also benefits another. This is illustrated by the case of a mortgagee, who, in order to save his security, pays off the Government revenue, a charge which, if not paid off, might result in a sale which would defeat not only the mortgagee's interest, but also the ownership of the mortgagor. To such a case the observations of the Lords of the Privy Council, which I have already quoted, are directly applicable, and whilst I am prepared to concede that those remarks are not directly applicable to the point now under consideration, I hold that the ultimate basis of the doctrine of equity upon which they proceed is identical in principle to the charge which a co-sharer in a zamindari *mahál* acquires upon the share of his co-sharer for such advances as he makes in payment of Government revenue, which being the first charge upon such estates, would, if unpaid, result in the sale of the whole estate. In the case of a mortgagee paying revenue due by the mortgagor, the principle is, that the payment was made to save the mortgage, and also the rights of the mortgagor. So also, in the case of a joint co-sharer in a zamindari estate paying off the revenue due not only on his own share, but also on that of his co-sharer, the object of payment is to save the whole estate. The distinction between the two cases therefore amounts only to a difference in detail, and, in my opinion, cannot alter the principle. The payment of revenue by one co-sharer on behalf of himself and another co-sharer of a *mahál* is in no sense an officious payment, because, but for such payment, his own zamindari rights of ownership might be defeated by sale in arrears of revenue."

I still adhere to these views, and following the *ratio* upon which they proceed, I hold that the plaintiff is entitled to the lien which he claims in this suit, and that such lien being in the nature of a charge such as that contemplated by s. 100 of the Transfer of Property Act, can be enforced as a first charge according to the rules, *mutatis mutandis*, applicable to simple mortgages. I also hold that inasmuch as the payment of Government revenue by the plaintiff saved not only the proprietary interest of defaulting co-sharers but also such interest as the defendant-appellant

1892

SETH CHITTOO
MAL
v.
SHIB LAL.

1892
SETH CHITOR
MAL
v.
SHIB LAL.

Chhitar Mal, possessed under his mortgages of 1873 in enforcement whereof he purchased the property in suit, the plaintiff's charge is paramount to those mortgages and that purchase, and the defendant-appellant cannot resist it, regardless of how much of the property purchased by him was subject to those mortgages and purchased in the enforcement of thereof, and how much was free from those mortgages and purchased by him under his decrees. Neither the mortgages nor the decrees under which the sale and purchase by the defendant-appellant took place could over-ride the paramount salvage lien which the plaintiff possesses under the equitable doctrine which I have endeavoured to explain. And to guard against being misunderstood, I wish to say, in the first place, that I do not rest my decision upon the doctrine of *subrogation*, for the plaintiff could not by payment of the Government revenue acquire the right of enforcing his lien in the same manner as the Land Revenue Act (XIX of 1873) entitles the revenue authorities to do by executive processes which I have already described. In the next place, I wish to point out, as I have already said, that in this case we are not dealing with the case of a mere volunteer who officiously makes payments, but with a person who, impelled by the requirements of the law and the exigencies of his own interests, in the joint estate, had to make payments of Government revenue to save the whole estate from being sold for arrears of Government revenue, a sale which would defeat the present defendant appellant's mortgages as much as the rights which his mortgagors, the original proprietors whose rights the defendant-appellant has purchased. In the third place, it must be observed that, so far as the defendant-appellant is concerned, we are not concerned with the case of a *bona fide* purchaser for value *without* notice, but with a person who, as is apparent from the facts of the case as stated, purchased with ample notice of the plaintiff's charge upon the estate for having paid arrears of antecedent Government revenue to save the estate from revenue sale, which would defeat the mortgages upon which he obtained decrees and in execution of which he purchased the property which he now wishes to save from the plaintiff's charge.

Limiting my rule, therefore, to these circumstances, and limiting the rule which I have laid down to the exigencies of this case, I would dismiss the appeal, and allowing the cross-objections raised by the plaintiff-respondent, set aside so much of the decrees of the lower Courts as dismiss the suit, and, following the principle of s. 100 of the Transfer of Property Act (IV of 1882), would frame a decree in terms of s. 88 of that enactment, fixing a period of six months for payment of the money, and in default of such payment awarding sale in enforcement of the plaintiff's lien.

1892
SETH CHITOR
MAL
v.
SHIB LAL

APPELLATE CIVIL.

Before Mr. Justice Mahmood.

HAR NARAIN PANDÉ (PLAINTIFF) v. RAM PRASAD MISR
AND ANOTHER (DEFENDANTS).*

1891
November 23

Pre emption—Wajib-ul-arz—Gift—Shankalp.

No right of pre-emption arises where land is assigned without consideration as *shankalp*.

The facts of this case sufficiently appear from the judgment of Mahmood, J.

Munshi Gobind Prasad for the appellant.

Munshi Madho Prasad for the respondents.

MAHMOOD, J.—This is a second appeal in regard to a dispute of which the facts are sufficiently clearly stated in the judgment of the lower appellate Court, which Court also framed the issues which arise in the case.

Briefly put, the matter relates to a transaction of the 29th of June 1887, when the defendant-respondent, Harihar Pandé, by an application for mutation of names, applied for and obtained the entry of the name of Ram Prasad Misr in the Government revenue records in respect of the property now in suit.

* Second Appeal No. 1408 of 1889, from a decree of Maulvi Muhammad Mazhar Hussin, Additional Subordinate Judge of Gorakhpur, dated the 12th September 1889, confirming a decree of Pandit Alopi Prasad, Munsif of Basti, dated the 24th April 1888.

1891
 HAR NARAIN
 PANDÉ
 v.
 RAM PRASAD
 MISR.

Thereupon the present plaintiff-appellant, Har Narain Pandé, dissatisfied with the transaction above mentioned, came into Court suing to enforce his right of pre-emption in respect to the transaction of the 29th of June 1887. Now this transaction is described as *shankalp*, and it has been found that it was a pure gift without any pecuniary consideration for it, and that it was not a sale, and upon this ground both the Courts below have concurred in dismissing the suit.

From these two concurrent decrees this second appeal has been preferred, and Mr. *Gobind Prasad* in his argument has relied upon the ruling of the majority of this Court in the Full Bench case of *Janki v. Girjadat* (1), where the majority of the Court laid down a proposition of law from which I had the misfortune to dissent. The learned vakil has also relied upon two unreported rulings of this Court in F. A. No. 170 of 1886 and F. A. No. 171 of 1886, which were decided by the present learned Chief Justice and my brother Tyrrell on the 22nd of February 1889.

Now in disposing of the case I do not wish to consider these various rulings in detail, because in my opinion the whole point upon which Mr. *Gobind Prasad's* argument rests is that according to the terms of the *wajib-ul-arz* in the case not only does pre-emption arise in respect of sale and mortgage, but also in respect of a simple gift without valuable consideration. The learned vakil in so arguing has invited my attention to the terms of the *wajib-ul-arz* in the two unreported cases above mentioned, and I think I may say that there is perhaps some cogency in the analogical comparison which he drew from the terms of the *wajib-ul-arz* in those cases as supplying a rule of interpretation for this *wajib-ul-arz* also. But, be it as it may, I think, the exigencies of this case require me only to interpret this *wajib-ul-arz*, which is the document before me, and of which s. 6 relating to pre-emption runs as follows:—

چھٹویں یہ کہ ہماروں میں اپنا حصہ کل یا جزو بذریعہ بیع و رش و غیرہ کے جدا کیا جائے تو پہلے حصہ دار کے ہاتھ بیچے و اگر نہ لیوے تب

(1) I. L. R., 7 All. 482.

اختیار انتقال بدست پدر ہوگا اگر بلا اطلاع حصہ دار غیر لے ہاتھ
منقول کرے تو وہ حق شفع کی رو سے ناجائز ہوگا فقط *

1901

HAB NABAIN

PANDE

v.

RAM PRA-
SAD MISH.

Now the words upon which Mr. *Gobind Prasad* relies most are two. The first is the use of the word ‘*و غیرہ*’ or “*et cetera*” after the words “*بیع و رهن*,” “sale and mortgage,” and the second word upon which the learned vakil relies is the word “*انتقال*” or “transfer,” which occurs later on in the pre-emptive clause. I am of opinion that, although the clause is not so clearly worded as it might have been, the rule of interpretation is well recognized, that where words describing one class of objects are employed and followed by the words “*et cetera*,” or words of a like signification, it must be understood that they are limited to that class of objects. Here it is clear to my mind what “*بیع*” and “*رهن*” mean, one meaning “sale” and the other “mortgage,” and the term “*et cetera*,” “*و غیرہ*,” which is employed thereafter, does not render the right of pre-emption available in respect of any such transaction as a simple gift, that is to say, gift without consideration, or a *shankalp* as in this case. I am fortified in this interpretation by the use of the word “*بیع*” that is to say “sell,” which occurs later on in the clause, and in view of these words the generic term “*انتقال*” or “transfer” does not in my opinion extend the right of pre-emption to any transfer which may be without pecuniary consideration.

Moreover, I have frequently said that in such cases of pre-emption, though based upon the *wajib-ul-arz*, in case of doubt or difficulty the principles of the Muhammadan law of pre-emption, which originated the right in India, should be applied, and here the finding being clear that the *shankalp* complained of was without pecuniary consideration and was a simple gift, it follows that no right of pre-emption would exist.

I therefore hold that the Courts below acted rightly in dismissing the suit, and I dismiss the appeal with costs, as the respondent is represented by Mr. *Bacha Ram* holding the brief of Mr. *Madho Prasad*.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Knox.

QUEEN-EMPRESS *v.* SUDRA.

1891

December 11. *Criminal Procedure Code s. 337—Pardon—Trial of person who having accepted a pardon has not fulfilled the conditions on which it was offered.*

Where a pardon has been tendered to any person in connection with an offence, he should not be tried for any alleged breach of the conditions of his pardon or for any offence connected with that for which he has received pardon until the trial of the principal offence, and of any offence connected therewith, has been completed.

This was a reference under s. 437 of the Code of Criminal Procedure 1882 made by the Sessions Judge of Jhansi. The facts of the case sufficiently appear from the referring order, which is as follows :—

“ I have, on the trial of Queen-Empress *v.* Nanhe, Muthu and Musammatt Sukhrani, charged under s. 302, Indian Penal Code, with the murder of Mohan Lal at Daun, on the 2nd of June last, examined the record of the case of Queen-Empress *v.* Sudra, committed for trial on the charge under s. 411, Indian Penal Code, of having received or retained possession of a bond stolen from Mohan Lal in connection with the murder, and find that on the 20th of June, Mr. Stuart tendered a pardon to Sudra, under s. 337 Criminal Procedure Code (not s. 327, Criminal Procedure Code, as stated), on the condition that he made a ‘ full confession of the whole of the circumstances within his knowledge relating to the murder of Mohan Lal.’ Notwithstanding this the Magistrate has committed Sudra for trial. I may remark that I can nowhere find any record of Sudra’s having accepted the conditional tender of pardon, but as he was subsequently examined as a witness against Brijlal and Badli, charged also with the murder of Mohan Lal, it must be assumed that Sudra did accept it.

“ S. 337 Criminal Procedure Code provides that every person accepting a pardon under this section shall be examined as a witness in the case, although it was not when the charges against Nanhe, &c., were under inquiry by the Magistrate that the tender of pardon was made and accepted ; it was in the case of the offence of murder

ing Mohan Lal that it was made. So that Sudra was in the position of a witness, and the tender of conditional pardon still subsisted while the case relating to the murder of Mohan Lal was pending. His commitment on the charge was therefore illegal, and in my opinion the record of his case must be submitted to the High Court that the commitment may be quashed. I may add that as the trial of Nanhe, &c., on the charge of murder has now been concluded, there is no objection to the Magistrate now acting in accordance with the provisions of s. 339, Criminal Procedure Code. Recently I submitted a somewhat similar case for the orders of the High Court, and the commitment was quashed; but before submitting the record in the present case, a copy of this proceeding will be sent to the Magistrate for any explanation he may desire to offer. The explanation should be submitted to this Court within four days.

* * * * *

“The Deputy Magistrate has returned an explanation in reference to the above order, but, so far as it is intelligible, I do not think it affords any reason for not sending up the records relating to the case of Sudra for the orders of the High Court. What is important to bear in mind is that the charge against Sudra is of having received or retained a bond or bonds supposed to have been stolen from Mohan Lal at or about the time of his murder. The Deputy Magistrate, when tendering the pardon, gives as his reason for doing so that ‘from the facts of the money bonds found in his possession having been the property of Mohan Lal, the murdered man, and known to have been in his possession at the time of his murder, there is strong presumption that the accused was himself directly or indirectly concerned in the murder, or at least of his being privy to it.’ I think the pardon must necessarily be held to include a pardon of whatever offence the accused may have committed arising out of, or even in any way connected with, Mohan Lal’s murder. The fact that the record of the case against Sudra, who was mixed up only with the charge of murder against Brijlal and Badli, who were not committed for trial, was different from the record of the case against Nanhe, &c., does not prevent the whole of

1891
QUEEN-
EMPERESS
v.
SUDRA.

1891

QUEEN-
EMPRESSv.
SUDRA.

the proceedings being in the case of the murder of Mohan Lal. In my opinion the Deputy Magistrate had no authority to withdraw the pardon tendered to Sudra so long as the charge of murder against any person was pending. I accordingly submit all the records of the two cases for such orders as the Hon'ble High Court may consider necessary."

On this reference the following order was made by Knox, J.:—

One Sudra received from the Deputy Commissioner of Jhansi an offer of pardon in the case of a murder committed upon the person of one Mohan Lal on the 2nd of June 1891. The tender of pardon was made to him with the view of obtaining his evidence, and it was made presumably on the usual conditions. Apparently the tender was accepted, and in a trial in connection with this murder held against two persons, Sudra was examined as a witness. It further appears that it was found necessary to charge other persons, namely, Nanhe, Muthu and Musammat Sukhrani, with the same offence of murder committed upon Mohan Lal. Before the case against these latter persons had been heard, Sudra, who had originally been arrested on a charge under s. 411, Indian Penal Code, was committed for trial to the Sessions Judge of Jhansi. The Sessions Judge of Jhansi has referred the commitment to this Court with a view of its being quashed, and the ground upon which he refers it is that until Sudra had been examined as a witness in the whole case or cases connected with the murder in respect of which tender of pardon had been made to him, he could not be tried for the offence in respect of which the pardon was tendered, or for any other offence of which he appears to have been guilty in connection with the same matter. The whole question turns upon the interpretation which is to be placed upon the words in s. 337, Criminal Procedure Code, namely, "every person accepting a tender under this section shall be examined as a witness in the case." It is, in my opinion, the intention of the law that a person to whom a tender of pardon, has been made in connection with the offence should not be tried for an alleged breach of the conditions upon which the pardon was tendered until the original case has been fully heard

and determined. There may arise cases in which owing to the absconding of offenders the trial at an early date of an approver who had not complied with the conditions on which the tender was made appears necessary or expedient, and I am not prepared to say that in such cases the result of the trial of the principal is always to be waited for. The point does not arise for determination, and I do not determine it. But where, as in the present instance, no such difficulty occurred, the provisions of s. 337 of the Criminal Procedure Code should have been strictly complied with, and in every case connected with the offence, namely, the murder of Mohan Lal, Sudra should have been examined as a witness, and until he had been so examined, his trial for any offence in connection with that murder should not have taken place. I accordingly quash the commitment and return the record. The District Magistrate of Jhansi can of course take any steps open to him in law for the further trial of Sudra if such trial appear necessary in the interests of public justice.

1891

QUEEN-
EMPRESS
v.
SUDRA.

APPELLATE CIVIL.

Before Mr. Justice Mahmood.

RAM SUKH DAS AND ANOTHER (DEPENDANT) v. TOTA RAM
(PLAINTIFF).*

1892
January 5.

Cross-decrees—Set-off—Civil Procedure Code, s. 246.

Where a decree-holder holds a decree against several persons jointly, one of whom holds a decree against him singly, both decrees being executable in the same Court, it is competent to the holder of the joint decree, under the provisions of s. 246 of the Code of Civil Procedure, to plead such decree in answer to an application for execution of the decree against him singly.

The facts of this case sufficiently appear from the judgment of Mahmood, J.

Mr. D. Banerji, for the appellants.

Mr. Niblett, for the respondent.

* Second Appeal No. 203 of 1891, from a decree of Babu Abinash Chunder Banerji, Subordinate Judge of Agra, dated the 18th December 1890, reversing a decree of Babu Baij Nath Prasad, Munsif of Mahaban dated the 14th June 1890.

1892
RAM SUKH
DAS
v.
TOTA RAM.

MAHMOOD, J.—The plaintiff-respondent, Tota Ram, obtained a decree for Rs. 192-4-0 against Chunni and four other persons. On the other hand Chunni obtained a decree for Rs. 43-14-0 against the above-named Tota Ram. Both these decrees were capable of execution in the Court of the Munsif of Mahaban, Tota Ram's decree having been transferred to that Court.

Before Tota Ram could take any action to execute his decree his judgment-debtor sold the decree to Ram Sukh, one of the defendants-appellants, on the 30th of July 1888, and upon Tota Ram's endeavouring to execute his decree he was met by objections by the said Ram Sukh, and those objections prevailed on the 20th of January 1889. Tota Ram then instituted the present suit to establish his right to execute his decree against Chunni's decree in the hands of the defendant Ram Sukh.

The first Court dismissed the suit, holding it to be barred by s. 244 of the Code of Civil Procedure, but the lower appellate Court has given sufficient reasons for holding that the section does not apply, and to this finding no objection is taken here before me on the other side.

The main ground upon which Mr. *Dwarka Nath Banerji* has rested his argument on behalf of the appellants is that, although under s. 233 of the Code of Civil Procedure, Ram Sukh must be taken to have purchased Chunni's decree subject to such equities as Tota Ram had against such decree, yet, inasmuch as Tota Ram's decree was not solely against Chunni, but also jointly against four others, therefore no such equities arose as would enable the two decrees to be dealt with under s. 246 of the Code of Civil Procedure. In support of his contention the learned counsel has invited my attention to illustration (b) to the section.

I am of opinion that the learned Subordinate Judge has arrived at correct conclusions. It is true that Tota Ram's decree was against Chunni and four others jointly, but since the decree of Chunni was solely against Tota Ram there seems no reason why Tota Ram should not be entitled to resist the execution of Chunni's decree by reason of his larger decree above mentioned. The illustra-

tion contemplates cases where there are judgment-creditors and not cases where the sole judgment-debtor is the sole creditor of another decree. I think this distinction is recognizable, and in *Hury Doyal Guho v. Din Doyal Guho* (1) it was actually ruled that a judgment-debtor may set-off against the amount of the decree against him the amount of a decree which he have obtained against the decree-holder and other persons.

I think the effect of the learned Subordinate Judge's decree in this case is consistent with the view which I have expressed. I therefore dismiss the appeal with costs.

Appeal dismissed

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Knox.

BECHAN RAI AND OTHERS (DEFENDANTS) v. NAND KISHORE RAI (PLAINTIFF).*

1892

January 8.

Conditional sale—Wajib-ul-arz—Pre-emption.

The pre-emption right of the parties to a deed of conditional sale cannot be affected by a *wajib ul-arz* prepared subsequently to the execution of the deed of conditional sale, but prior to the sale becoming absolute, they not being parties to the *wajib-ul-arz*, and the *wajib-ul-arz* not apparently indicating any pre-existing custom of pre-emption in the village. *Raghubir Singh v. Nandu Singh*, (2) distinguished.

The facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of Edge, C. J.

Munshi *Jwala Prasad* and Munshi *Gobind Prasad*, for the appellants.

Pandit *Sundar Lal*, for the respondent.

EDGE, C. J.—This was a pre-emption suit brought under a *wajib-ul-arz* in respect of a sale of a share within the village. The sale arose in this way. The share-holder in the village executed in favour of the present vendees two deeds of conditional sale. Sub-

* Second Appeal No 1691 of 1888 from a decree of a Rai Lalta Prasad Subordinate Judge of Gházipur, dated the 13th August 1888, modifying a decree of Mulvi Sayyid Zain-ul-abdin, Munsif of Korantadih, dated the 9th January 1888.

(1) I. L. R. 9 Calc. 479.

(2) Weekly Notes, 1891. p. 134.

1892
BECHAN RAI
v.
NAND
KISHORE
RAI.

sequently to the execution of the deeds and to the making of the contracts embodied in the deeds a *wajib-ul-arz* was prepared, agreed to and sanctioned in the village. After the making of the *wajib-ul-arz* the mortgage by conditional sale became, on operation of the agreement contained in the deeds of conditional sale and the default of the mortgagor, an absolute sale. It is in respect of this absolute sale that this pre-emption suit has been brought. According to the plaintiff, respondent here, alleged that by the *wajib-ul-arz* it was agreed that there should be a right of pre-emption in the case of any share-holder wishing to sell, mortgage, &c., his share. The plaintiff did not rely upon any custom of pre-emption existing in the village at the time of the execution of the deeds of conditional sale. He simply relied upon an agreement contained in a *wajib-ul-arz* subsequent in date to the deeds of conditional sale, by which the right of pre-emption was created in the village. It appears to me that no subsequent village contract to which the parties to the conditional sale-deeds were not agreeing parties could alter the rights of the conditional vendee under his deeds. Those rights came into existence on the making of the deeds of conditional sale. The change of the transaction from one of mortgage to one of absolute sale merely followed as the legal result of events contemplated by the contract of conditional sale. We were referred to the case of *Raghubir Singh v. Nandu Singh* (1). With regard to that case I may point out that there not only was a *wajib-ul-arz* agreement relied upon, but the plaintiff also relied upon a village custom. A *wajib-ul-arz* may not only be evidence of the existence of village custom at the date of the *wajib-ul-arz*, but it may also possibly afford evidence that such custom was a pre-existing custom in the village. How far these considerations account for the decision of the case I need not consider. In the present case I am clearly of opinion that the subsequent *wajib-ul-arz* agreement cannot affect the legal and equitable rights which the conditional vendee has by the agreement contained in the deeds of conditional sale acquired. I would allow the appeal and dismiss the suit with costs in all the Courts.

(1) Weekly Notes 1891, p. 134.

KNOX, J.—I also concur in decreeing the appeal. In fact I should have had no difficulty in arriving at this decision, but for a reference which was pressed upon up to the judgment in *Raghubir Singh v. Nandu Singh* (1), to which I was a party. Upon reference to the notes taken when that case was argued, I am of opinion that there was this clear distinction between that case and the case now before us, that in the prior case the claim for pre-emption proceeded not merely upon the *wājib-ul-arz*, but also upon a custom alleged in the plaint and borne out by the language used in the *wājib-ul-arz*. In the present case no attempt has been made to base the claim upon custom, and I have not been referred to any clause in the *wājib-ul-arz* which indicated that any custom upon this point existed prior to the completion of the *wājib-ul-arz*, which was admittedly completed in the village between the time the deeds of conditional sale were executed between the parties and afterwards became a complete sale.

1892
BECHAN RAI
v.
NAND
KISHORE
RAI.

Appeal decreed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

RAM MANOHAR MISR (DEFENDANT) v. LAL BEHARI MISR AND
ANOTHER (PLAINTIFFS).*

1892
January 27,

*Civil Procedure Code—s. 514—Arbitration—Power of Court to extend time
for making award.*

A Court has power to act under s. 514 of the Code of Civil Procedure at any time before the award is actually made, whether the time previously limited for making the award has expired or not. *Raja Har Narain Singh v. Chaudhrain Bhagwant Kuar* (2) referred to.

The facts of this case sufficiently appear from the judgment of the Court.

Mr. J. E. Howard, for the appellant.

The Hon'ble Mr. Spankie, for the respondents.

EDGE, C. J., and TYRRELL, J.—This is an appeal from a decree passed in accordance with an award. The learned counsel for the

* Second Appeal No. 873 of 1889 from a decree of J. C. Leupolt, Esq., District Judge of Gházipur, dated the 15th April 1889, confirming a decree of Babu Mrittonjoy Mukerji, Subordinate Judge of Gházipur, dated the 29th March 1884.

(1) Weekly Notes, 1891, p. 134. (2) L. R. 18, I.A. 55; s.c. I.L.R., 13 All. 300.

1892
 RAM MANO.
 HAR MISE
 v.
 LAL BEHARI
 MISE.

appellant desired to argue that the arbitrator had been guilty of misconduct. That point was decided against his client by the Court below, and is not apparently open to him in appeal here. Section 522 of the Code of Civil Procedure enacts how and when the decree is to be drawn up, and further enacts:—"No appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award." It is not contended that the decree in question is either in excess of or not in accordance with the award. The other contentions put before us on behalf of the appellant are, that no time was fixed by the Court originally for the making of the award; that no order under s. 508 of the Code of Civil Procedure was drawn up; that the Judge wrongly exercised, his discretion in extending the time for the making of the award, and that some of the orders of extension were made after the time previously limited for making the award had expired. We have gone through the different petitions and orders in this case. On the 16th of July 1886, there is the order of the Court referring the matter to arbitration, and, as we read that order, it fixed the 16th of August 1886 for the award to be returned to the Court. There was a further order made on the 21st of July 1886. It appears that the arbitrator went to Gaya. It appears also that the Judge went on leave; and it appears by the proceedings that at the desire of the respective parties the matter was suspended during the time of the Judge's absence on leave. When he came back from leave he made an order directing that a formal order should be drawn up, and the papers forwarded to the arbitrators. We must presume that a formal order was drawn up in accordance with the Judge's direction and forwarded to the arbitrators. We may further infer that that was done from the fact that subsequently there was an application for extension of time, and from the fact that the arbitrator himself petitioned for a further extension of time, alleging in that petition that he had been ill with fever. Now on the 17th of December 1886 the last order extending the time was made. By that order the time was extended to the 17th of January 1887. The award was made on the 11th of January 1887, consequently it was made within the extended time given by the Judge.

In the case of *Raja Har Narain Singh v. Chaudhrain Bhagwant Kuar*, their Lordships of the Privy Council held that under s. 514 of the Code of Civil Procedure, a Judge has power from time to time to extend the time for making an award. In the case which was before them one of the orders extending the time was made some days after the time which had been fixed by the previous order had elapsed; so that, having regard to the facts of the case which was before their Lordships of the Privy Council, we must infer that their Lordships were of opinion that a judge has power at any time before the award is actually made to act under s. 514 of the Code of Civil Procedure. The award in that case was upset on another ground. Now we have come to the conclusion on the facts appearing in the record of this case that the proceedings were not *ultra vires*, and that the award having been made within the time which was given by the order of the 17th of December 1886 cannot be impeached on any of the grounds to which we have been referred. There was another ground taken by the counsel for the appellant to which we shall now refer. It was that his client had revoked the agreement to refer, and had done so before the award was made, and at a time when there was no order extending the time for the making of the award. That attempted revocation was put before the Court by means of an application, which was apparently rejected. Now we are of opinion that neither party to this reference had any power to revoke the agreement to refer without the consent of the Court. There are grounds upon which the order of reference may be amended or set aside, but when once a Court has passed its order of reference, as it did here in the appeal which was before it pass that order on the agreement of the parties, we are of opinion that neither party had power to revoke except by consent of the Court and under an order of the Court. We dismiss this appeal with costs.

Appeal dismissed.

(1) L.R., 18 I.A. 55 : s.c. I.L.R., 13 All., 300.

REVISIONAL CRIMINAL.

1892
January 30.

Before Mr. Justice Straight.

QUEEN-EMPRESS v. BASHIR KHAN AND ANOTHER.

Criminal Procedure Code, s. 192.—Transfer—Procedure to be followed where a case has been transferred after the evidence for the prosecution has been recorded.

A Magistrate to whose Court a case under s. 355 of the Indian Penal Code had been transferred at a stage when all the evidence for the prosecution had been taken, did not re-summon the witnesses for the prosecution but proceeded to act on their evidence as if it had been taken before himself;—*Held* that whether such procedure amounted to an irregularity or illegality or not, it was sufficiently prejudicial to the accused to warrant the conviction being quashed.

The facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of Straight, J.

Mr. *Fateh Chand*, for the petitioners.

The Government Pleader (*Munshi Ram Prasad*) for the Crown.

STRAIGHT, J.—In this case charges were preferred before the Honorary Magistrates of Agra against the two petitioners for an offence under section 355 of the Indian Penal Code, that is to say, of committing an assault with the intent to dishonor a person, that person being one Sukhdeo Prasad, the complainant. The case was pending before the Honorary Magistrates, when an application was put in by the accused to have it transferred from that Bench to the Court of a first class Magistrate, and accordingly an order of transfer was made to the Court of Muhammad Isa Khan, a first class Magistrate of the Agra District. At the time of the transfer all the witnesses had been examined for the prosecution and a charge had been framed. After the transfer, the petitioners filed two petitions praying that the Magistrate to whose Court the case had been transferred would re-summon the witnesses for the prosecution and have them examined before himself *de novo*. This the learned Government Pleader admits was not done, and he further concedes that so far as the evidence-in-chief of those witnesses was concerned, the Magistrate acted upon their depositions as recorded before the Honorary Magistrates.

I think this was a most objectionable course in a case of this description, and, whether it amounts to an irregularity or an illegality, which I do not think it necessary to decide, I think that the accused persons were prejudiced, and that the conviction under such circumstances should not stand. I accordingly set it aside. I am informed that the petitioners have had nearly three months' imprisonment already; and, assuming the facts as stated by the convicting Magistrate to be accurately stated for this purpose, I do not think it necessary to direct that any further proceedings should be taken.

The order as to security is quashed.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

GAURI SHANKAR (DEFENDANT) *v.* BABBAN LAL AND ANOTHER
(PLAINTIFFS).*

1892
February 2.

Act XIX of 1873 (N.-W. P. Rent Act), s. 221—Civil Procedure Code, s. 521—Arbitration—Award delivered after expiration of time allowed by Court.

The principle of the ruling of the Privy Council in *Raja Har Narain Singh v. Chaudhrain Bhagwant Kuar* is applicable also to arbitrations under s. 221 of Act No. XIX of 1873.

The facts of this case sufficiently appear from the judgment of the Court.

Mr. C. C. Dillon, for the appellant.

Munsbi Jwala Prasad, for the respondents.

EDGE, C. J., and TYRRELL, J.—This was a suit for rent in the Revenue Court. It was referred to arbitration under s. 221 of Act No. XIX of 1873, and in the order of reference the time for delivery of the award was specified. The award was not delivered until after that time. Although our attention has not been drawn to any express provision of Act No. XIX of 1873, similar to that contained in the last paragraph of s. 521 of Act No. XIV of 1882,

* Second Appeal No. 889 of 1889 from a decree of W. J. Martin, Esq., District Judge of Mirzapur, dated the 13th April 1889, confirming a decree or Maulvi Muhammad Ismail Khan, Deputy Collector of Mirzapur, dated the 28th January 1889.

1892
GAURI
SHANKAR
v.
BAEBAN LAL.

we think that the principle of the decision of their Lordships of the Privy Council in *Raja Har Narain Singh v. Chaudhrai Bhagwant Kuar* (1) applies. We should say that there was here no extension of time, and that it was really the acts of the parties which caused the award not to be made within the time allowed. However, as s. 221 of Act No. XIX of 1873 enacts that the time for the delivery of the award *shall* be specified in the order of reference, we must give effect to it and hold that the award was bad. The proceedings on the award must be treated as null and void. We set aside those proceedings and refer this case back to the first Court, which will dispose of the suit according to law. Costs will abide the result.

Cause remanded.

1892
February 12.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

KHARAG PRASAD BHAGAT AND ANOTHER (PLAINTIFFS) v.
DURDHARI RAI AND OTHERS (DEFENDANTS).*

Jurisdiction—Dismissal of suit by Munsif on preliminary point—Remand by Subordinate Judge on appeal—Fresh appeal before second Subordinate Judge, who disagrees with the finding of the former Subordinate Judge.

Where there are two Subordinate Judges in the same place, one of such Judges is not competent to overrule the decision of the other. The Court is one, though there are separate presiding officers. *Suraj Din v. Chatter* (2) and *Ram Kirpal v. Rup Kuari* (3) referred to.

The facts of this case sufficiently appear from the judgment of the Court.

The Hon'ble Mr. *Spankie* and *Munshi Jwala Prasad*, for the appellants.

Mr. *Amiruddin*, for the respondents.

EDGE, C. J., and TYRRELL, J.—This suit was instituted in the Court of the Munsif of Ballia, who dismissed the suit on the ground that the suit should have been brought in the Revenue Court, and

* Second Appeal No. 1148 of 1889 from a decree of Pandit Bunsidhar, Subordinate Judge of Ghazipur, dated the 28th August 1889, confirming a decree of Maulvi Abdul Ghafur, Munsif of Ballia, dated the 16th January 1889.

(1) L. R., 18 I. A. 51 s.c. I. L. R.,
13 All. 300.

(2) I. L. R. 3 All. 755.
(3) I. L. R. 6 All. 269.

1892

KHARAG
PRASAD
BHAGHATD.
DURDHARI
RAI.

that consequently he had no jurisdiction. There was an appeal which was heard by one of the two Subordinate Judges of Gházipur. He decided that the suit was a Civil Court suit and remanded the case under s. 562 of the Code of Civil Procedure to the Court of that Munsif to be disposed of on the merits. The Munsif tried the case and passed a decree from which there was an appeal. The appeal happened to go to the other Subordinate Judge of Gházipur, who holding that the suit was Revenue Court suit and could not have been brought in the Civil Court, allowed the appeal and dismissed the suit. The plaintiffs have brought this second appeal. It is contended on their behalf that the second Subordinate Judge of Gházipur had no power to question the legal propriety of the order of the other Subordinate Judge. It is really one Court, but there are two Subordinate Judges. On the other hand, it is contended that the decision of the last Subordinate Judge was right. We are clearly of opinion that Pandit Bansidhar, the second Subordinate Judge, had no power to overrule the decision of Mr. Lalta Prasad, the first Subordinate Judge, and that he was bound by it. That point was decided in this Court as far back as 1881 in the case of *Suraj Din v. Chatter* (1), which was a similar case. The principle which was enunciated by their Lordships of the Privy Council in *Ram Kripal v. Rup Kuari* (2) would apply here. The Full Bench case of *Deokishep v. Bansi* (3) does not apply. The order which we must pass in this case is an order setting aside the decree of Pandit Bansidhar and remanding the case under s. 562 of the Code of Civil Procedure to the Court of the Subordinate Judge of Gházipur to be disposed of according to law. Mr. Amiruddin's clients, the defendants, will not be damnified, because, should the Subordinate Judge find against them on the merits, they can raise, in an appeal from his decree, the question of jurisdiction and of the correctness of the order of remand of Mr. Lalta Prasad. That they can do so under s. 591 is amply shown by a judgment of this Court in the case of *Rameshwar Singh v. Sheodin Singh* (4), and by the High Court at Bombay in the case of *Savitri*

(1) I. L. R., 3 All., 755.

(3) I. L. R., 8 All., 172.

(2) I. L. R., 6 All., 269.

(4) I. L. R., 12 All., 510.

1892 *v. Ramji* (1). We set aside the decree of the Subordinate Judge, and remand the case under s 562 of the Code of Civil Procedure, and direct it to be restored to the file of pending appeals in the Court of the Subordinate Judge. Costs will be costs in the cause.
 KHARAG PRASAD BHAGAT *v.* DUBBHARI RAI. *Cause remanded.*

Before Mr. Justice Mahmood.

1892 *BANDHU BHAGAT (DECREE-HOLDER) v. SHAH MUHAMMAD TAQI*
 February 15. (JUDGMENT-DEBTOR).*

Civil Procedure Code, s. 577—Unverified sulahnamah—Execution of decree—Mortgage, redemption of—Decree not specifying result of non-payment of mortgage—debt within the time prescribed thereby for payment—Limitation—Act XV of 1877 (Indian Limitation Act), sch. ii. art. 179.

Where an application purporting to contain the terms of a compromise was presented to the High Court by one of the parties to an appeal before it, but on the so called *sulahnamah* being sent down to the Lower Court for varification, it was found that the attendance of the parties for that purpose could not be procured;—

Held that the High Court was not justified in passing a decree under s. 577 of the Code of Civil Procedure in accordance with the terms of the unverified *sulahnamah*.

Where a decree for redemption of mortgage stated that the amount due under the mortgage should be paid within four months, but omitted to state what the result would be if the mortgage debt was not so paid;—

Held that it was competent to the decree-holder to execute such a decree at any time within the period of limitation prescribed by art. 179 of the second schedule of Act XV of 1877.

The facts of this case sufficiently appear from the judgment of Mahmood, J

Mr. *Abdul Raoof*, for the appellant.

The respondent was unrepresented.

MAHMOOD, J.—In this case there is a preliminary matter which must be stated before I proceed with the judgment upon the merits of the appeal.

The case being a pending case upon the files of this Court, an application bearing date the 10th of March 1890, and purporting to

* Second Appeal No. 1241 of 1889 from a decree of J. J. McLean, Esq. District Judge of Azamgarh, dated the 24th June 1889, confirming a decree of Rai Kulwant Prasad, Subordinate Judge of Azamgarh, dated the 17th July 1888.

have been signed by the respondent, Shah Muhammad Taqi, was presented to my brother Tyrrell on the 11th of March 1890, and his order upon the application bearing that date was :—
 “Send to the Court below for verification.” The application seems to have been so sent down, but it appears from the letter of the District Judge of Azamgarh, dated the 3rd of May 1890, “that several adjournments were granted at the request of their vakils for the appearance of the parties, but none of them has attended, and their vakils now say that they have heard nothing of them of late.”

1892
 BANDHU
 BHAGAT
 v.
 SHAH
 MUHAMMAD
 TAQI.

Upon this state of things the report of the District Judge came up before my brother Straight, who by his order of the 9th of May 1890, directed that the application called the *sulahnamah* be sent back and the case put up before the Court.

The case appears then to have been put up before my brother Tyrrell, who in his order of the 30th of April 1891, which is upon the original application of compromise, said :—“Send down again for verification.”

This also has been done, and the learned District Judge has returned the *sulahnamah*, again unverified, and he adds that “the pleaders were directed to produce the parties on the 6th of June 1891, but as the latter did not appear, the 13th of June was fixed. On that date they were again absent, and notices were consequently issued fixing the 11th of July 1891 for their appearance. One of these notices was served on the person of Bandhu Bhagat and the other was fixed on the door of Muhammad Taqi's house, but in spite of such service none of the parties has appeared, nor is there any likelihood of their appearance.”

Mr. *Abdul Raoof*, who appears for the judgment-debtor appellant, has contended that the proceedings taken by the Lower Court are sufficient to enable me to accept the unverified *sulahnamah* of the 10th of March 1890, and that in consequence of these circumstances I am bound to act under s. 577 of the Code of Civil Procedure and to make a decree in the terms of the *sulahnamah*.

1892

BANDHU
BHAGAT
v.
SHAH
MUHAMMAD
TAQI.

I am of opinion that the powers conferred by that section upon Courts of appeal are powers which require that parties should be in accord with each other at the time when the decree is pronounced by the appellate Court. The use of the word "may," which is significant in the section, is also important, because it indicates discretion in a Court and does not force the Court to pass a decree in any manner which goes beyond the scope of its discretionary power.

There is, therefore, nothing to bind me sitting here as a Judge in a second appeal (though I concede that by dint of s. 582, s. 577 is, *mutatis mutandis*, also applicable to second appeals) that in a case such as this I should act upon the document which is before me, dated the 10th of March 1890, and bearing the order of my brother Tyrrell, dated the 11th of March 1890, and another order, dated the 30th of April 1891.

The reason why I think that in this case I should not act upon this document is simple. As I have already stated, repeated attempts have been made by orders of the Court of obtain from the parties the verification of the *sulahnamah* or deed of compromise, and it followed that these attempts have failed, and because they have failed there is no necessity for me to act under s. 577 of the Code of Civil Procedure, because the failure has been due to the negligence of the parties to attend to verify the compromise at which they arrived. I regard the document therefore as useless for the purpose of disposing of the case.

Then comes the hearing, which after the expression of my opinion I gave to Mr. *Abdul Raoof* for the appellant; the respondent, for whom the name of Mr *Jokhu Lal* appears, being absent altogether. The appeal has been heard therefore *ex parte* upon the merits.

Now upon the merits the facts of the case are simple. The respondent, Shah Muhammad Taqi, decree-holder, obtained against the appellant, Bandhu Bhagat, on the 5th of February 1887, a decree for redemption of certain properties which are admitted by Mr. *Abdul Raoof* to have been usufructuarily mortgaged to the appellant. In that decree there was a period fixed for redemption, and

it was four months, that is to say, a period which would end on the 5th of June 1887.

1892

BANDHU

HAGAT

SHAH
MUHAMMAD
TAQI.

In the decree so made, whilst fixing the period of four months, there was no condition such as that which is contemplated by the last paragraph of s. 92 of the Transfer of Property Act, to the effect that if such payment is not made on or before the day fixed by the Court, the plaintiff should be absolutely debarred of all rights to redeem the property.

The decree thus framed was evidently a decree which, if it was finally framed and gave *even* a wrong order as to debarring redemption if payment of the mortgage money was not made within the time limited by it, would be binding upon me sitting here as a Judge dealing with execution of the decree. But the decree did not say so, and the decree therefore must stand as it stands without any such exception or interpretation as that contemplated by the last paragraph of s. 92 of the Transfer of Property Act (IV of 1882).

It is probably in consequence of the decree not having been properly framed that this litigation began. It began in an application made on the 29th of May 1888, by the decree-holder, respondent, for redemption and on the 1st of June 1888 the money required for redemption is admitted by Mr. *Abdul Baoo* to have been deposited in Court.

The question then is simple. Whether a condition as to deposit was or was not valid in law for the purpose of preventing redemption which had been decreed in favor of the respondent on the 5th of February 1887?

I am of opinion that in the absence of any limits contained in the decree, a Court executing the decree is not justified nor bound to go beyond its terms. Here the decree fixed four months, but did not fix what the result would be if within that period the money was not deposited. And since it did not do so, it follows that the ordinary law regulating the limit for execution of decrees would apply, that is to say, the rule contained in art. 179 of sch. ii of the Limitation Act (XV of 1877).

1892
 BANDEU
 BHAGAT
 v.
 SHAH
 MUHAMMAD
 TAQI.

It was upon this principle that Mr. Justice Oldfield and myself in *Karamat Ali v. Inayat Husain* (1) held that the right of redemption cannot be considered as having been barred, and upon this ground we allowed execution, because the money had been deposited within the period allowed by the rule of limitation applicable to the decree, namely, the period awarded by the Limitation Act. Similar is the effect of the *ratio* upon which the judgment of my brother Straight and myself proceeded in *Hulas Rai v. Pirthi Singh* (2).

Before leaving this point alone I desire to express as clearly and briefly as I can the reason why the limitations established by a decree are not to be placed upon the same footing as limitations as to time or otherwise imposed by the legislature for purpose of the audibility of causes, *ad litem ordinationem*. The reason is simple. One is the act of a Judge, the other is the act of the legislature, and it cannot be that any Judge by fixing one hour, or one day, or one month, or one year for obedience to his order would render it impossible for the party aggrieved to have his remedy by the ordinary procedure within the time allowed by the Legislature. This view is the principle of what I said in the Full Bench case of *Kodai Singh v. Jaisri Singh* (3).

For these reasons I think that upon the findings of the lower appellate Court this appeal is not sustainable. I therefore dismiss the appeal, but without costs, as the respondent is not represented.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Straight.

QUEEN-EMPRESS v. MAKHDUM.

1892
 February 22. *Criminal Procedure Code, ss. 195, 476, 487—Act XLV of 1860, s. 193—False evidence—Jurisdiction—Sessions Judge.*

A Sessions Judge who has directed the trial of a person for the offence of giving false evidence committed in the course of a judicial proceeding of a criminal nature before him cannot try the case himself. *Empress v. Ganga Din* (1) distinguished.

(1) Weekly Notes, 1884, p. 329. (2) I. L. R., 9 All. 500.

(3) I. L. R., 13 All. 376.

The facts of this case sufficiently appear from the judgment of Straight, J.

Mr *W. S. Howell* and *Babu Becha Ram Bhattacharji*, for the appellant.

1892
QUEEN-
EMPRESS
v.
MAHJIDUM.

The Government Pleader (*Munshi Ram Prasad*) for the Crown.

STRAIGHT, J.—For the purpose of determining the question of law that arises before me in this appeal, it is only necessary that I should state the following brief facts. Upon the trial before the Sessions Judge of Jhānsi of one Wilayat Husain for the offence of giving false evidence contrary to the provisions of s. 193 of the Indian Penal Code, the appellant was examined as a witness and deposed to certain facts. The learned Sessions Judge being of opinion that in his depositions he had been guilty of giving false evidence under s. 476 of the Code of Criminal Procedure, adopted the procedure therein laid down, with the result that the appellant was committed to his Court to take his trial for an offence under s. 192 of the Indian Penal Code. The Sessions Judge has tried and convicted him and sentenced him to a term of 3 years' rigorous imprisonment. The initial objection taken to that decision is that by s. 487 of the Code of Criminal Procedure, the jurisdiction of the Sessions Judge was taken away, and that he had no power to enter upon the trial. A number of cases have been quoted in the course of the hearing of the appeal, among them *Sundriah v. The Queen* (2), *Regina v. Goji Kom Ranu* (3), *Empress of India v. Kashmiri Lal* (4), *Empress v. Gaspar D'Silva* (5), *Empress v. Gauri Shankar* (6), *Empress v. Chait Ram* (7), *Queen-Empress v. Sarat Chandra Rakshit* (8). This last case is a Full Bench decision.

I am of opinion that the contention for the appellant must prevail. The offence of giving false evidence is one of those mentioned in s. 195 of the Code of Criminal Procedure. That offence was committed before the Sessions Judge and came under his notice

(1) Weekly Notes 1887, p. 139.

(2) I. L. R. 3 Mad. 254.

(3) I. L. R. 1 Rom. 311.

(4) I. L. R. 1 All. 625.

(5) I. L. R., 6 Bom. 479.

(6) I. L. R. 6 All. 42.

(7) I. L. R. 6 All. 103.

(8) I. L. R. 16 Calc. 766.

1892

QUEEN-
EMPEESS
v.
MAKHDOM.

in the course of a judicial proceeding, that is to say, upon the trial of Wilayat Husain.

As Sessions Judge he was the Judge of the Criminal Court, and it is not pretended that s. 477, s. 480 or s. 485 could have any application to the circumstances of this case. Accordingly I hold that there was a direct statutory prohibition to the Sessions Judge trying this case, and that in trying it he acted without jurisdiction, which conditions of things no subsequent provision of the Criminal Procedure Code pretends to, or could, cure. I agree to this extent in the view expressed in the Full Bench ruling of the Calcutta Court that I have quoted, and it is not necessary for the purposes of this case to enter into other questions. I should have had no doubt as to the proper conclusion to arrive at upon the questions of law, but for the ruling of the learned Chief Justice reported in the *Empress v. Ganga Din* (1). It is deserving of notice in regard to that case that apparently the attention of the learned Judge was not directed to the terms of s. 437, but there is nothing, as far as I can gather, to show that in that particular case the trial which took place before the Sessions Judge in the first instance was in his character of Sessions Judge, and I am disposed to presume, until I am satisfied as to this, that the trial out of which the prosecution sprang was of a civil character. I allow this appeal, and setting aside the conviction and sentence, direct that the commitment be transferred to the Court of the Sessions Judge of Cawnpore for disposal according to law.

1892

February 23.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

HARGOBI D AND OTHERS (DEFENDANTS) v. NONI BAHU (PLAINTIFF).*

Evidence—Document rejected as inadmissible but allowed to remain on the record—Civil Procedure Code, section 142A.

Where a document tendered in evidence in a Court of first instance was rejected as inadmissible but was nevertheless allowed to remain on the

* Second Appeal No. 1194 of 1889 from a decree of G. L. Lang, Esq., Commissioner of Jhansi, dated the 20th August 1884, confirming a decree of Babu Baldeo Prasad, Deputy Collector of Jhansi, dated the 22nd June 1889.

(1) Weekly Notes 1887, p. 139.

record of case,—*Held* that the mere fact of the document remaining on the record did not make it evidence in the appellate Court, but it must be tendered as evidence in the appellate Court and accepted thereby.

1892
HAR GOBIND
v.
NONI BAHU.

The facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Mr. *Amiruddin* and Maulvi *Mehdi Hasan*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondent.

EDGE, C. J., and TYRRELL, J.—The suit in which this second appeal has been brought by the defendants was one to have a mortgage set aside. The one question for decision in this suit was as to whether any consideration had been paid. The defendants produced and tendered in evidence a document purporting to be a receipt for the consideration. That document was rejected by the first Court on the ground that it was not proved as against the plaintiff. The suit was brought on the 26th of April 1889, consequently after Act VII of 1888 had come into force. The document bears an endorsement showing why it was rejected. It remains on the record notwithstanding the provisions of cl 2 of s. 142A of the Code of Civil Procedure. The suit was decreed by the first Court, all the material issues having been found in favor of the plaintiff. The defendants appealed, and that portion of the memorandum of appeal to the lower appellate Court which relates to the document in question is as follow :—“An unregistered receipt may be inadmissible in evidence, but is sufficient for the satisfaction of a Court of justice.” That was a broad proposition, but whether well founded or not we need not consider, because the document in question was not tendered in evidence in the lower appellate Court. It has been contended here that it was the duty of the lower appellate Court to deal with the document, inasmuch as it had not been returned to the defendants by the first Court. We do not accede to that argument ; we assume that by some oversight on the part of some officer of the first Court, or by reason of the defendants or those who represented them not asking to have the document handed over to them it was allowed to remain on the record. The fact of its being on the record did not avoid the necessity which the

1892
HAR GOBIND
v.
NONI BAHU.

defendants were under to tender it in evidence to the lower appellate Court, if they wanted to rely on it. S. 142A cl. (2) is explicit, and the document in question not having been admitted in evidence cannot be treated as forming part of the record, although in fact it is found amongst the papers on the record. We do not consider whether the document was admissible in evidence under the Registration Act or whether if it was inadmissible in evidence under the Registration Act, a Court of justice could look at it or not. It was not tendered in evidence in the lower appellate Court, and no question consequently arises upon it. The other matters raised in the appeal are concluded by the findings of fact in the lower appellate Court. The appeal is dismissed with costs.

Appeal dismissed

CIVIL REVISIONAL.

Before Mr. Justice Straight.

1892
February 29.

GAURI DATT (DECREE-HOLDER PETITIONER) v. SHANKAR LAL
(JUDGMENT-DEBTOR, OPPOSITE PARTY).*

Execution of decree—Insolvency—Two reliefs not concurrent—Civil Procedure Code, ss. 351 et seqq.

A decree-holder in respect of whose judgment-debtor an order declaring him insolvent and appointing a receiver has been passed under s. 351 of the Code of Civil Procedure, and whose decree has been placed on the list of the judgment-debtor's scheduled debts, cannot, *pari passu* with the proceedings in insolvency, go on executing his decree in the ordinary way against that judgment-debtor. *Badal Singh v. Birch* (1), and *Abdul Rahman v. Behari Puri* (2), distinguished.

The facts of this case sufficiently appear from the judgment of Straight, J.

Munshi *Ram Prasad* and *Kunwar Parmanand*, for the applicant.
Babu *Jogindro Nath Chaudhri*, for the opposite party.

STRAIGHT, J.—This is an application for revision under s. 622 of the Code of Civil Procedure of an order of the Small Cause Court Judge of Allahabad, dated the 29th of August 1891. Gauri

* Miscellaneous Application for revision under s. 622 of the Code of Civil Procedure.

(1) I. L. R. 15 Cal. 762.

(2) I. L. R. 10 All. 194.

Datt, the petitioner, held a decree for money, dated the 11th of February, 1887, against Shankar Lal. In the early part of 1888, Shankar Lal got into difficulties, and upon the 14th of April 1888 an order was passed under s. 351 of the Code, declaring him an insolvent, and upon the same date a receiver was appointed. Subsequently to the order in insolvency certain parties, alleging themselves to be the creditors of Shankar Lal, came forward, and among them was Gauri Datt, the holder of this money decree, and a schedule of creditors was prepared, and in that schedule was included the name of Gauri Datt, and there it remains to the present moment. Now Gauri Datt, outside of the proceedings in insolvency, has gone with his decree to the Court of Small Causes, and, despite the pendency of those insolvency proceedings, has sought execution of it in the ordinary way. The learned Small Cause Court Judge has held that that money decree of Gauri Datt has become part and parcel of the scheduled debts under s. 352 of the Code of Civil Procedure, and that any rights Gauri Datt has under that decree must be regulated by Chapter XX of that Code.

1892
GAURI DATT
v.
SHANKAR
LAL.

Mr. *Ram Prasad* has strenuously argued to the contrary, and in support of his contention he has referred to two cases, *Badal Singh v. Birch* (1) and *Abdul Rahman v. Behari Puri* (2). With regard to the first of these rulings I think it enough to say that it is distinguishable upon the ground, first, that no receiver was appointed, and, secondly, that the decree of the decree-holder was obtained after the order in insolvency had been made. With regard to the second ruling, it seems to me clearly distinguishable, because, whether rightly or wrongly, the learned Judges who decided that case held that under the circumstances therein disclosed there was bar to a suit under s. 283 by the party who had obtained a decree against a person in respect of whom an order in insolvency had been made.

It seems to me that Mr. *Ram Prasad's* contention, if effect were given to it, would practically render the whole provisions of Chapter XX of the Code nugatory and useless. I presume that

(1) I. L. R., 15 Calc., 762.

(2) I. L. R., 10 All. 194.

1892

GAURI DATT

v.

SHANKAR
LAL.

they were framed with two objects : first, the relief of an embarrassed judgment-debtor from obligations that he was honestly unable to meet, and secondly, that creditors who came in and proved in the insolvency proceedings were to share and share alike out of the proceeds or assets derived from the property of the insolvent, and provision is made in ss. 357 and 358 as to what protection is to be afforded to the insolvent, and under what circumstances he is to be held discharged from further liability in respect of his scheduled debts. If Mr. *Ram Prasad*'s contention is to be given effect to, this startling state of things would arise, that where an order of insolvency had been passed and the insolvent had a hundred creditors, fifty of whom were decree-holders and fifty of them entitled to sums of money from him, not only might they avail themselves of the provision of s. 352, but the fifty decree-holders might, *pari passu*, go on executing their decrees in fifty different Courts, and that the other fifty parties entitled to money from the judgment-debtor might institute fifty suits in fifty different Courts. Unless I read s. 352 as excluding not only the capacity to institute execution proceedings but also to institute suits, in either case it would be open to a decree-holder or creditor to adopt the above course. Mr. *Ram Prasad* says, unless there is a prohibition in terms to a decree-holder's executing his decree he must be allowed to do so, even though he is a scheduled creditor. My reply is that the position he contends for is wholly inconsistent with the scope and effect of the provisions of Chapter XX. The learned Subordinate Judge is right in the view he took, and I refuse this application with costs.

Application refused.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.
 POHKAR SINGH (PLAINTIFF) v. GOPAL SINGH AND OTHERS
 (DEPENDANTS).*

1892
 March 3.

*Letters Patent, s. 10—Civil Procedure Code, ss. 556, 558 and 558, cl. (27)—
 Dismissal of appeal for default—Appeal under s. 10 of the Letters
 Patent from order of dismissal.*

No appeal under s. 10 of the Letters Patent will lie from an order under s. 556 of the Code of Civil Procedure dismissing an appeal for default, the appellant not having had recourse to the procedure provided by s. 558 of the said Code.

The facts of this case, so far as they are necessary for the purposes of this report, sufficiently appear from the judgment of Edge, C. J.

Munshi *Jwala Prasad*, for the appellant.

Munshi *Ram Prasad* and Munshi *Kashi Prasad*, for the respondents.

EDGE, C. J.—This is a Letters Patent appeal. The second appeal out of which it arose came on to be heard before our brother Mahmood on the 20th of July 1891. It was dismissed for default under s. 556 of the Code of Civil Procedure. The appellant, instead of following the course provided for by s. 558 of that Code, presented this Letters Patent appeal. I am of opinion that when the Code of Civil Procedure provides a specific remedy the appellant must follow it, and not having done so in this case, I would dismiss his appeal with costs.

STRAIGHT, J.—In support of what has fallen from the Chief Justice, I would point out that Mr. *Jwala Prasad* sought to support his appeal upon an affidavit of merits and facts connected with the dismissal for default. The best person to deal with those merits and matters of fact was the Judge who dismissed for default, and I believe that it was for this reason that the section was framed, in order that the Judge who dismissed for default might have an opportunity of readmitting or refusing to readmit the appeal, and in the latter case the appellant is entitled to the advantage of the appeal provided for by s. 558, cl. (27).

* Appeal No. 34 of 1891, under s. 10 of the Letters Patent.

Before Mr. Justice Straight and Mr. Justice Knox.

BISHESHAR (PLAINTIFF) v. MUIRHEAD (DEFENDANT).*

1892

March 4.

Zamindár and tenant - Lessor and lessees - Lessee taking lease direct from zamindár - Suit by occupancy tenant to eject zamindár's lessee - Equitable estoppel.

Where a person took a permanent lease of a cultivatory holding direct from the zamindár without making any inquiries as to who were the cultivators and on what tenure they held; and where, the permanent lessee having commenced to build, one of the cultivators, being an occupancy tenant, subsequently brought a suit in ejectment against him:—*held* that the lessee should, by the knowledge that the land was a cultivatory holding, have been put on his guard and have made inquiries as to the exact condition of the title, and that as he had not done so the doctrine of equitable acquiescence could not be applied in his favour.

THE facts of this case sufficiently appear from the judgment of Straight, J.

Munshi Kashi Prasad, for the appellant.

Mr. W. M. Colvin, for the respondent.

STRAIGHT, J.—This suit was brought by Bisheshar Ahir for ejectment of the defendant from an area of land amounting to 15 biswas 7 dhurs situated in the zamindari of Bechupur, of which one Prayag Singh is the zamindár. Prior to the month of June 1887, the plaintiff was the occupancy tenant of Prayag Singh and in occupation and cultivation of the land in suit with other land constituting an occupancy tenure of 11 bighas 10 biswas and 9 dhurs. It is not denied that in the month of June 1887, the defendant inclosed within a fence the land claimed by the plaintiff in the present suit along with other land; and that within the area so fenced in he has planted trees and has erected a building at the cost of a very considerable sum of money. The plaintiff says;—"in doing this you are a trespasser, who has interfered with and destroyed my enjoyment of my occupancy right." The defendant replies;—"I did so under the warrant and authority of a lease granted to me by Prayag on the 4th of June 1887." Another ground taken up by the defendants which it would be convenient to dispose of at once was that Prayag should have been made a

* Second Appeal No. 357 of 1889, from a decree of C. Donovan, Esq., District Judge of Benares, dated the 8th December 1888, confirming a decree of Pandit Raj Nath, Munsif of Benares, dated the 26th June 1888

party to the suit; and that as through his action in granting the lease to the defendant, under which the defendant acted, the plaintiff had been dispossessed, his proper procedure was under clause (n), s. 95 of the Rent Act against the zamindár, and that no action having been taken within six months from the date of the dispossession he was barred by time and was not entitled to come into the Civil Courts to maintain the present suit. That view was adopted by the first Court, and the same view was taken by the learned Judge in appeal, and it is upon that ground that he has upheld the decision of the first Court dismissing the plaintiff's claim.

1892

BISHESHAR
v.
MUIRHEAD.

It is impossible that I can hold this view to be sound law. The plaintiff was undoubtedly an occupancy tenant of a certain piece of land. The defendant, a stranger, came upon that land and interfered with it in such a way as to destroy the plaintiff's occupancy rights. He was undoubtedly a trespasser, and against such a person I have no doubt whatever that the plaintiff, wholly irrespective of any statutory right he might have had as against his landlord under the Rent Act, was entitled to seek relief from the Civil Court to restore possession to him as against this trespasser. I am therefore very clearly of opinion that the ground upon which the suit was dismissed by the lower Courts was wrong, and that their judgments cannot be sustained.

Then comes a very grave and serious question for consideration which arises upon the contention of the learned counsel for the respondent, namely, that taking the facts as stated in the judgment of the lower Court and as found by the learned Judge, the doctrine of equitable acquiescence should be applied as against this plaintiff, and that it should be held that he by his conduct is estopped now from asserting his occupancy rights in the land to which this suit relates.

I cannot help saying that there has been a good deal of loose talk with regard to this doctrine of equitable acquiescence, and that there are to be found judgments which in a way that is not altogether satisfactory applied or refused to apply it. It is well that I should, so far as my own view is concerned, very clearly point out what I understand to be the principle that should govern us.

1892
BISHESHAR
v.
MUIRHEAD.

In enunciating this principle it must be borne in mind that we have a provision contained in our Evidence Act which at least indicates the lines upon which an estoppel of any kind should proceed. Undoubtedly if the owner of a piece of land stands by while another person professes to sell that land to a third party, and he does not interfere, but allows that other person to hold himself out to be the owner of the land and to make a transfer of it, he is not to be heard afterwards for the purpose of destroying that purchaser's title by asserting to the contrary, though he may upset that title if he can show either that the purchaser had notice of his title, constructive or actual, or that circumstances existed at the time of the purchase which, as a reasonable man, should have put him upon his guard and suggested inquiry, which inquiry, if made, would have resulted in his ascertaining the title of the true owner. In that case, supposing he makes out such a case, the purchaser cannot hold on to his purchase, and the true owner is entitled to his property. That Principle is laid down in the cases of *Ramcoomar Koondoo v. Macqueen* (1), and *Uda Begam v. Imam-ud-din* (2), and is embodied in s. 41 of the Transfer of Property Act.

In dealing with a case like the present, where the zamíndár was granting a perpetual lease at a ground rent of an area of land of 11 bighas 15 biswas, it was in my opinion incumbent upon the defendant, knowing the circumstances, as he must be presumed to have known them, that attach to the tenure of land in India, to make inquiries as to whether subordinate to the zamíndár's interests there were cultivatory interest in the land which would have to be compensated or provided for under the lease. As regards a considerable portion of this land, it is clear from the circumstance of the present plaintiff's claim and of the claim of the plaintiff in the other suits that it is and has long been a cultivated area. This was a fact in itself such as to put the defendant upon his guard and to make it incumbent on him as an ordinarily prudent and cautious man to make inquiry. If he had made inquiry the unavoidable result must have been that he would have ascertained the interest as occupancy tenant of this plaintiff and the others. He did no such thing. He

(1) L. R., I. A., Supp. Vol. 40

(2) I. L. R., 1 All., 82.

was content to take from the zamindár, and the zamindár alone, this perpetual lease, and it is not suggested that he ever entered into or made any inquiry. In that aspect of the matter it does not appear to me that as defendant in this cause he can be heard upon the question of acquiescence which was put forward by his learned counsel. Having failed to make inquiries he must be presumed to have had notice or to have known of the existence of the right of the plaintiff in this suit and the plaintiffs in the other suits. He must be taken to have known that there were other persons who had interests in this land upon which he was building these erections and which he was inclosing. I think therefore that there was no equitable estoppel maintainable against the plaintiff.

1882
BISHNESHAR
v.
MURHEAD.

It has been urged that the case has aspects of hardship as regards the defendant. No doubt it is a matter for regret that he should have spent so considerable a sum of money upon the erection of the buildings; but he is in no worse position than any other man who, having failed to take the necessary precautions required of him, finds himself confronted by a person whose title he has overlooked. On the other hand, it may be said that these occupancy tenants have been placed in a serious difficulty by having their rights interfered with and their cultivation of the land, which they held on the strength of a tenant's right created and recognised by statute, disturbed.

I think therefore that the plaintiff is entitled to succeed in his suit, and I decree the appeal, and, reversing the decree of the lower Courts, decree the plaintiff's claim to possession of this land, but direct the decree be not given effect to for a period of three months from the date of the decree, during which period of time the defendant must be afforded full leave and license to go upon the land and to remove the materials. Under all the circumstances, I think the proper order to make about costs is that each party is to bear its own costs.

KNOX, J.—I concur entirely in the order and also in the reasons for the same.

Appeal decreed.

PRIVY COUNCIL.

P. C.
1892
March
5 and 25.

CHANDI DIN (PLAINTIFF) *v.* NARAINI KUAR (DEFENDANT).

On appeal from the High Court at Allahabad.

Civil Procedure Code, ss. 566 and 567.—The framing a new issue by an appellate Court.—Evidence recorded in one suit admitted by consent at the hearing of another.

In the Court of first instance the appellant, upon the title of a sister's son, was one of the plaintiffs who obtained a decree for an inheritance, the suit having been heard at the same time with another, in which relations of the deceased owner, alleging themselves to be of the same *gotra* with him also obtained a decree as his heirs. Evidence in the latter suit was received in that of the appellant by consent of parties, both suits having been brought against the same defendant, whose title, as widow of a son alleged to have been adopted by the last owner, was set up in both, but was not proved.

Appeals having been filed in both suits, in that brought by the sister's son a new issue was framed by the appellate Court, under section 566, Civil Procedure Code, as to whether he was entitled as nearest of kin, or was excluded by the other claimants whose suit was, at that time, compromised.

Held, that, after what had taken place in regard to both suits, the appellate Court could frame this issue, although it was new, and had not been raised by the defendant's written answer.

With reference to the evidence in the one suit having been imported as a whole into the other at the first hearing; and the admission of evidence upon the trial of the new issue; it was held, that the parties intended that the evidence should be admitted, and that no irregularity had taken place materially affecting the decree of the High Court, which dismissed the suit of the sister's son, on return made under section 567.

Appeal from a decree (17th of December 1886) of the High Court, reversing, after remand, a decree (22nd of June 1881) of the District Judge of Bareilly.

This appeal was preferred in one of two suits brought by two sets of plaintiffs against the same defendant and transferred from the Court of the Subordinate Judge to that of the District Judge, by whom they were heard together. In one of these suits, *Chandi Din and others v. Naraini Kuar* evidence recorded in the other, *Piyare Lal and others v. Naraini Kuar*, was admitted by consent.

Present: LORDS HOBHOUSE, MACNAGHTEN and HANNEN, and SIR R. COUCH

The principal questions in this appeal were as to the appellate Court having framed a new issue and referred it under section 563 to the original Court ; and as to the admission in the one suit of evidence heard in the other.

1899
CHANDI DIN
v.
NARAINI
KUAR.

The facts giving rise to the suit are stated in the report of the appeal in the High Court, *Naraini Kuar v. Chandi Din and others* (1).

Both suits were for possession by right of inheritance of ancestral estate consisting of villages, gardens, houses and other properties valued at Rs. 5,84,480 which had belonged to Chaudari Naubat Ram, a Kanaujia Brahmin of Bareilly, who died in 1837, and to whom the plaintiff-appellant, Chandi Din, was related as sister's son. The plaintiffs in the other suit were Piyare Lal, who died pending the appeal in the High Court, Shib Lal and Bhairon Prasad, descended from an ancestor common to them and to Naubat Ram. In both suits the defence has set up that the defendant, Naraini Kuar, being the widow of the late Raghunandan Ram, who had been the adopted son of Naubat Ram, was, therefore, entitled to the succession ; and in Piyare Lal's suit Naraini pleaded that the plaintiffs were strangers, and not related to the family. Not only did the suits differ in respect of the titles set up, but originally there were other co-plaintiffs with Chandi Din, not claiming under his title. These were Mussamat Dayan, who claimed as step-mother of Naubat Ram, and Mashuk, a purchaser of part of the shares claimed by each of the other two plaintiffs. The representatives of this purchaser were parties to this appeal. Dayan withdrew her claim when the suit was first before the District Judge, and the purchaser also abandoned that part of the property to which title had been alleged through her. There being thus, more especially at first, an absence of identity in the plaintiff's interests, both sets, while the suits were pending in the Court of the Subordinate Judge, on the 4th of July 1879, applied that they might be added as defendants, each set in the suit in which they were not plaintiffs. The order was made in that Court, purporting to be under section 32, Civil Procedure Code, that they should be added as defendants. This order, however,

(1) I. L. R. 9 All. 167.

18'2 was reversed (16th of February 1880) by the High Court (*Pearson*
 CHANDI DIN and *Straight, JJ.*), and the Judgement is here given, as it may be
 v.
 NARAINI considered relevant to this report, and is of importance in the
 KUAR. branch of procedure to which it relates. *Straight, J.*, said :—

“ Apart from all questions of inconvenience or embarrassment to the principal defendant in the conduct of her defence should she fail to establish the adoption on which the whole fabric of her case rests, I do not see how, as between the plaintiffs and the joined defendants, no matter in which case, any decision that can be passed will estop either of them from subsequent assertion of their rights against one another in a separate suit. It does not appear to me that the plaintiffs in either case could have joined the other plaintiffs in their original plaint as defendants, for they sought no relief against them, and the relief they did seek against Musammat Narain Kuar was not, in the sense of section 28, in respect ‘ of the same matter.’ The joinder of the two sets of plaintiffs as defendant, in accordance with the order of the Subordinate Judge, can only be reasonable if they are to be legally bound by the decree in one suit not only as to the principal defendant, but as between themselves : and it is only in this sense that ‘ their presence before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit.’ But the question involved in each suit is not what are the rights of two sets of plaintiffs *inter se* ; the issue to be decided between the defendant, Musammat Naraini Kuar, and each set of plaintiffs is perfectly plain and intelligible, and, as she is in possession, the burden of proof will be on those who assail her title. Necessarily all the plaintiffs are interested in the determination of the “ adoption ” set up by the principal defendant ; but, as I have already remarked, I do not see how a finding upon this point in either suit can bind the joined defendants to the plaintiffs or the plaintiffs to the joined defendants in respect of their mutual claims between one and another to the property ; or in the event of the principal defendant establishing the adoption in one case, can obviate a second trial. No plea of *res judicata* could be sustained.

Upon the argument before us Mr. Hill for the appellant called our attention to three judgments of Sir Barnes Peacock, reported in 7 W. R., p. 262 ; 8 W. R., p. 16 ; 10 W. R., p. 368, which are valuable and instructive. For though these were given upon cases arising under section 73 of Act VIII of 1859, the reasoning and principles of interpretation enunciated may appropriately be followed in construing section 32 of Act X of 1877. Under section 73 of Act VIII of 1859, the Court had power to join 'all parties who may be likely to be affected by the result,'—an expression that might be taken to mean a great deal more than was ever intended by the Legislative authorities, and which Sir Barnes Peacock, in the judgments already adverted to, was careful to qualify and reduce within intelligible limits. But now reading, as I think one should, sections 28, 29, and 32 of Act X together, the terms 'questions involved in the suit' must be taken to mean questions directly arising out of, and incident to, the original cause of action, in which, either in character of plaintiff or defendant, the person to be joined has an identity or community of interest with that party in the litigation on whose side he is to be ranged. I do not lay this down as an invariable rule by which applications under section 32 of Act X should be determined, for cases may arise similar to one reported at p. 315 of Vol. 7 W. R., and another which may be found in 3 B. L. R., p. 23 ; but in the multitude of instances it will be a useful test to apply in deciding whether the presence of parties is necessary to enable the 'Court effectually and completely to adjudicate and settle the questions involved in the suit.' I entirely agree with the remarks of Pontifex, J., in *Mahomed Badsha v. Nicol, Fleming and others* (1) ; and applying them to the present cases, it appears to me that the joinder of the two sets of plaintiffs as defendants was not necessary to enable the Court effectually and completely to settle the question arising between the plaintiffs and Musammat Naraini Kuar in the respective suits. The order of the 4th of July 1879 was on these grounds reversed. Both suits accordingly

1892
CHANDI DIN
NARAINI
KUAB.

(1) I. L. R., 4 Calc., 355.

1892 proceeded without being consolidated, but both were transferred to
CHANDI DIN the Court of the District Judge and heard together.

v.
NARAINI
KUAR.

The District Judge having decreed (20th of June 1881) the claims of the plaintiffs in both suits for possession of their shares in the property with costs of all parties out of the estate, the defendant, Naraini Kuar, filed separate appeals in each suit. In the appeal of *Naraini Kuar v. Piyare Lal and others* the parties arrived at a compromise, of which the terms were drawn up in a decree. In the appeal of *Naraini Kuar v. Chandi Din and others* the Court (8th of July 1885) ordered that the suit should be referred to the District Judge, under s. 566, Civil Procedure, for a finding "whether Chandi Din, plaintiff, was, according to Hindu law, as nearest heir, entitled to the property left by Naubat Ram." The District Judge found (15th of April 1886) that Chandi Din was not the heir of Chaudhri Naubat Ram, but that two persons, *viz.* Shib Lal and Bhairon Prasad, now and at the commencement of the suit, both living, stood nearer in point of heirship to Naubat Ram than did Chandi Din. Return was made accordingly. Objections disputing the correctness of this return were disallowed, and the High Court (7th of December 1886), affirming the conclusion of the District Judge upon the issue, dismissed Chandi Din's suit. The judgment is reported at p. 469 of I. L. R., 9 All.

Mr. J. D. Nayne and Mr. G. E. A. Ross, for the appellant. Under the circumstances the order of the 8th of July 1885, framing a new issue, was not rightly made. It enabled the defendant, Naraini Kuar, to put forward a new defence in the Court of appeal, which had not been set up in the first Court. This new defence was inconsistent with that on which she relied in the other suit, tried with this, in which she was defendant. At the trial of the new issue much of the evidence consisted of that adduced in the compromised suit. Naraini in that suit had originally pleaded that the plaintiffs, Piyare Lal, Shib Lal and others, were strangers and not of Naubat Ram's family. She was, therefore, debarred from taking the inconsistent ground that they belonged to his

family in a degree nearer than that of the plaintiff Chandi Din. Objections had been taken on behalf of the latter to the admission of evidence, which, however, had been admitted with the result that the pedigree put forward for the defence was found proved. This finding was tantamount to one that Shib Lal and Bhairon Prasad of the family of Piyare Lal, who had died during these proceedings, were seventh in descent from one Hiranman, the ancestor common to them and to Chaudhri Naubat Ram; to whom, in fact, as might have been found but for the irregular admission of evidence, Chandi Din was the nearest heir.

1892
CHANDI DIN
v.
NARAINI
KUAR.

Mr. *R. V. Doynes* and Mr. *C. W. Arathson*, for the respondent, were not called upon.

Their Lordships' judgment was delivered by LORD HOBHOUSE.

In this case their Lordships understand that no question is raised for the purposes of this appeal as to the correctness of the findings of the High Court either in law or in fact, but the objection is one preliminary to those findings, and consists of a suggestion that the High Court have committed improprieties in point of procedure by which the appellant has been prejudiced. The first impropriety alleged is the remand to the District Judge in order to try the issue whether the plaintiff Chandi Din is the nearest heir under the Hindu law to the estate left by Naubat Ram. It is contended that inasmuch as the defendant Naraini Kuar had not raised that issue in her written statement, and as the issue had not been tried by the District Judge, she was debarred from raising it. Their Lordships think that there is no ground for that contention. When the suit was first instituted against Naraini she claimed under an alleged adoption of the deceased husband by Naubat Ram, and she disputed the title of the two rival sets of alleged heirs who brought suits against her. The title of Piyare Lal and others was established against her by decree; and although that decree was not affirmed by the High Court, but was the subject of compromise between her and others, she then had a perfect right to say:—"That title which I disputed or ignored before has been established against me by a decree, and I now claim to set it up in order to defeat the claim made by persons

1892 who allege that they are heirs of Naubat Ram." She had a right
 CHANDI DIN to have that question tried, and the High Court directed it to be
 tried

7.
 NARAINI
 KUAB.

The next objection is that a quantity of evidence has been improperly admitted; and in order to see exactly how that stands, their Lordships will take notice of the state of the litigation.

Two suits were brought against Naraini Kuab in the year 1879, one by Chandi Din, the present appellant, who claimed to be the heir of Naubat Ram, and the other by Piyare Lal and others, who also claimed to be heirs of Naubat Ram. The District Judge attempted to consolidate those suits so as to settle the question *uno actu* between the various litigant parties, but, no doubt for good technical reasons, that well-meant attempt was defeated, and the two suits had each to go on independently of the other. But in point of fact there were issues in those suits which were identical with one another, and they went on *pari passu*, and were tried simultaneously before the District Judge.

There was one question—a material one—which was not common to the two suits, and that was the question whether Piyare Lal and his faction, as they are called—his co-plaintiffs—were of kin to Naubat Ram. That question did not arise in Chandi Din's suit, but it was certainly a most reasonable course that the evidence taken in one suit should be admitted in the other; and the parties came to an agreement on the 12th of January 1881 that the evidence adduced in the case of Piyare Lal should be accepted also in the case of Chandi Din. There was no limit then put as to the kind of evidence that was to be adduced. The agreement extends to the whole evidence, and the whole evidence in Piyare Lal's suit was imported into that of Chandi Din. When the remand took place, a further agreement was come to between the parties on the 19th of January 1886, by which it was agreed that the evidence recorded by the Subordinate Judge in a subsequent suit that was brought by the co-plaintiffs of Piyare Lal should be admitted for the determination of the issues in the present case; and subsequently to that, *viz.*, on the 15th of February 1886, an application was made that the

original papers contained in the record of the case of *Chaudhri Shib Lal and others v. Chandi Din*, and those in the case of *Chaudhri Shib Lal and Piyare Lal and others v. Naraini Kuar*, decided on the 20th of June 1881, should be pursued, and on that day an order was made that the list of documents produced in Piyare Lal's suit should be put up with the record. All that list appears to have been treated as evidence upon the trial of the issue ordered by the remand.

1882
CHANDI DIN
v.
NARAINI
KUAR.

It is objected that the agreement of 1881 should be limited by confining it to that evidence which related to the issues common to the two suits; and it is alleged that the District Judge erred in admitting for the trial of the issue on remand the whole of the evidence which was admitted under the order of 1881. But their Lordships find that there was ample opportunity for considering the effect of the evidence admitted by the order of the 15th of February 1886. The evidence appears to have been taken into consideration on the 19th, 20th, and 22nd of February 1886. The 10th of March was fixed for the hearing, and in fact the case was heard from the 1st to the 3rd of April 1886. There seems to have been some discussion as to the admission of particular documents; it does not matter exactly what the discussion was, but it shows that the attention of the parties was called to the state of the evidence; and there does not appear to have been any objection made then to the admission of this evidence in bulk. The District Judge, in his judgment, refers to the agreement to take the evidence in the second suit of Piyare Lal's party, and then he states this:—"Of the evidence adduced on behalf of the appellant Rani Naraini Kuar, a great portion consists of that adduced by Piyare Lal and others in their former suit against her;" but he does not go on to say that any objection was taken. It is apparent that no objection was taken; but an objection was founded upon that evidence to the effect, as has been already referred to, that Naraini Kuar was by her conduct in Piyare Lal's suit estopped from raising the issues which the District Judge had to try between her and Chandi Din.

1892
CHANDI DIN
v.
NARAINI
KUAR.

Now it appears to their Lordships that if there was any objection to the admission of this evidence it should have been made at that time. Either there should have been an objection that the agreement of 1881 did not apply to it, and that it should be rejected *in toto* until proved independently; or some application should have been made providing that Chandi Din should be placed in as favorable a position as if the evidence had been originally adduced against him by Naraini Kuar, instead of being adduced by Piyare Lal. But nothing of the kind took place.

On appeal to the High Court some objection was made, which it is not very easy to construe, to the effect that the District Judge had misapprehended the consent as to reading the evidence on the record of the cases pending in the Subordinate Judge's Court; but even then no objection was raised that the District Judge was wrong in admitting the evidence adduced in the case of *Piyare Lal v. Naraini Kuar*. Therefore it is very difficult for the appellant to make anything of that written objection upon the appeal. Before the High Court it appears that certain specific objections were made to a large number of documents. In the first place an objection was made to the whole, as not coming from proper custody. But that is not an objection that they were not properly admitted, excepting on that one ground that they did not come from the proper custody.

There are a number of specific objections on other grounds, but no trace of an objection that the District Judge was wrong in admitting the evidence in bulk as given in the suit of Piyare Lal.

Their Lordships are clear that the parties really intended that the evidence should be admitted; and probably it was the most reasonable course to take. There is no reason to suppose that if any objection had been taken by Chandi Din the whole of this evidence could not have been proved against him; and the parties took a shorter and a cheaper course by admitting it in bulk, as it was given in the suit of Piyare Lal.

In the result their Lordships will humbly advise Her Majesty that the judgment appealed against ought to stand, and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant :—Messrs *Barrow and Rogers.*

Solicitors for the respondent :—Messrs *T. L. Wilson and Co.*

1892
CHANDI DIN
v.
NARAINI
KUAR.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

DEOKI PRASAD AND OTHERS (PLAINTIFFS) v. INAIT-ULLAH
(DEFENDANT).*

1892
March 5.

Muhamma dan Law—Waqf—Waqf-namah containing provision for descendants of grantor.

The fact that the grantor of a *waqf* has in the deed constituting the same made some provision for the maintenance of his kindred and descendants will not render the *waqf* invalid. *Shah Mahomed Ahsan-ulla Chowdhry v. Amirchand Kundu* (1) and *Muzkurool-Huq v. Puhraj Ditarey Mohapatrar* (2) referred to.

The facts of this case sufficiently appear from the judgment of Edge, C. J.

Mr. *Amiruddin*, for the appellants.

The Hon'ble Mr. *Spankie*, for the respondent.

EDGE, C. J.—The plaintiffs, appellants here, on the 19th of March 1885 obtained a money decree against Kudrat Ali. On the 27th of July 1885, Kudrat Ali executed a deed which is alleged to be a *waqf-namah*, and thereby transferred a portion of his property to his son Inait-ullah. The appellants here proceeded to execute their decree against the portion of the property which had been assigned by the deed of the 27th of July 1885. Inait-ullah filed objections claiming that the property was *waqf*. His objections were allowed, and thereupon the plaintiffs brought this suit against Inait-ullah and his father Kudrat Ali. The first Court decreed the suit. The lower appellate Court allowed the appeal of Inait-

* Second appeal No. 888 of 1888 from a decree of Lala Lalta Prasad, Subordinate Judge of Ghazipur, dated the 21st March 1888, reversing a decree of Lala Bageshri Dial, Munsif of Bagra, dated the 17th November 1887.

(1) L. R., 17 I. A., 38

(2) 13 W. R., 235.

1892

DEORI
PRASAD
v.
INAIT-
ULLAH.

ullah and dismissed the suit with costs. From the decree of the lower appellate Court this second appeal has been brought. Kudrat Ali did not defend the suit. He is not a respondent here. The sole respondent here is his son Inait-ullah. Mr. *Amiruddin*, for the appellants, contended, firstly, that the assignment of the 27th of July 1885 was a fraudulent transfer within the meaning of s. 53 of the Transfer of Property Act. It is not necessary to decide whether or not s. 2, clause (d) of the Transfer of Property Act excludes s. 53 of that Act. I say it is not necessary to decide this, because it has been found by the lower appellate Court that Kudrat Ali was possessed of other property quite sufficient to pay off the decree. Consequently the case cannot come within s. 53 of the Transfer of Property Act. The other point taken by Mr. *Amiruddin* is that the document of the 27th of July 1885 is not a valid *waqf-namah* according to Muhammadan law. His contention is that it is void under Muhammadan law, as it provides for the descendants and kindred of the grantor as well as for certain religious purposes, and he relies on the decision of their Lordships of the Privy Council in the case of *Sheik Mahomed Ahsan-ulla Chowdhry v. Amarchand Kundu* (1). In my opinion the document which was considered there was a very different document from the document which we have to consider here. In this case the object of the *waqf-namah* was, firstly, to provide for the support of the descendants and kindred of the grantor who might be in great want and need of support, and the surplus of the income of the property was to go to purposes which were undoubtedly religious purposes. In my opinion that was a good *waqf namah* and I would dismiss the appeal with costs.

MAHMOOD, J.—The learned Chief Justice has already dealt with the case so completely that I only wish to add a few words. One observation which I have to make is that the deed of *waqf-namah* now before us was a valid *waqf-namah* according to Muhammadan law, and that the views expressed by the learned Chief Justice in this case are in accord with those expressed by Kemp, J.,

(1) L. R., 17 I. A., 28.

in the case of *Muzhurool Hug v. Puhraj Ditarey Mohapattur* (1). The next observation I have to make is that these views were accepted by their Lordships of the Privy Council in this very case of *Sheik Mahomed Ahsan-ulla Chowdhry v. Amarchand Kundu* (2), and that that case, far from supporting the appeal, seems to me to be opposed to it. For these reasons I agree with all that has fallen from the learned Chief Justice and also in the decree which he has made.

1892

DECKI
PRASAD
v.
INAIT-
ULLAH.

Appeal dismissed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

DULI SINGH (PLAINTIFF) v. SUNDAR SINGH (DEFENDANT).*

1892

March 5.

Hindu law—Hindu widow—Gift.

The widow of a separated Hindu being in possession, as such widow, of property left by her husband, executed a deed of gift of such property in favour of her daughter's son, her daughter being also a party to the deed. Subsequently to the execution of this deed of gift the executant's daughter gave birth to another son:—*held* that the deed in question could not affect more than the life interests of the executant and her daughter, and could not operate to prevent the succession (as to a moiety of the property) opening up in favor of the subsequently-born son on the death of the survivor of the two ladies. *Ramphal Rai v. Tula Kuari* (3) referred to.

The facts of this case sufficiently appear from the judgment of Straight, J.

Mr. D. Banerji and Maulvi Ghulam Mujiaba, for the appellant.

Mr. Roshan Lal and Pandit Sundar Lal, for the respondent.

STRAIGHT, J.—One Bhimjit was the admitted owner of the property to which the suit relates, and he occupied the position of a separated Hindu in possession of separate estate. He was married to one Hira Kuar, who, upon his death in 1850, survived him. By Hira Kuar he had one daughter, Musammat Rukmin, who was married to a man of the name of Fateh Singh. By Fateh Singh she had two sons, Kharak Singh, who is a *pro formâ* defendant in the present litigation, and Duli Singh, who is the plaintiff. Hira

* First appeal No. 36 of 1891 from an order of Babu Ganga Saran, Subordinate Judge of Agra, dated the 11th October 1890.

(1) 13 W. R., 235.

(2) L. R., 17 I. A., 28.

(3) I. L. R., 6 All., 116.

1892
DULI SINGH
v.
SUNDAR
SINGH.

Kuar died in the year 1877. Rukmin and Fateh Singh both died in the year 1832. Hira Kuar during her lifetime made a deed of gift of the property now in suit with other properties in favor of her grandson Kharak Singh. This was in the year 1872, and possession was given and mutation of names recorded, a reservation being made in the deed of gift in favor of the donor to the effect that an allowance of Rs. 100 *per annum* was to be paid to her by the donee. At the time when the deed of gift was assented to by Musammamat Rukmin Kharak Singh was the immediate reversioner. It is also a material fact that at the time of the deed of gift Duli Singh, the present plaintiff, had not come into existence. At some time prior to his death Fateh Singh, professing to act as the guardian of his minor son, Kharak Singh, made a charge in favor of the defendant undar Singh in respect of the property in suit, together with another share in it which we are not concerned with in the present litigation. Subsequently the defendant Sundar Singh obtained a decree in respect of his charge and put it into execution against half the property as representing the interest of Kharak Singh, and he brought it to sale, and there is an end of that. Now he has attached the other half of the property as the property of his judgment-debtor, and he sought to bring it to sale. Duli Singh, the plaintiff, objected to the sale; his objection was disallowed, and consequently he has had to bring the present suit to have his right in this particular property declared. It is therefore obvious that the whole title of the defendant-respondent rests upon the question of what by the transaction of 1872 Kharak Singh, his judgment-debtor, had acquired. The case for the plaintiff is that as the grandson of Bhimjit, his right to succession in the property of Bhimjit did not arise or open up until the death of his mother in 1882, and that no assent given by his mother to the transaction of the gift of 1872 could affect his right or destroy his title to succeed to his share in the estate on the death of his mother. The first Court decreed the plaintiff's claim, holding in effect that the estate of the widow and the estate of the reversioner, Musammamat Rukmin, who assented to her making the gift, being of a limited nature, they between them could not do more than affect their own limited

interests to the extent of anticipating the succession of Kharak Singh before the time he would otherwise have been entitled to it. I have considered this view of the matter, which has been supplemented by the able argument of Mr. *Banerji* in support of the appeal, and it certainly appears to me to be in harmony with the view expressed by the Full Bench of this Court in *Ramphal Rai v. Tula Kuari* (1). Mr. *Sundar Lal* has contended that the estate of a Hindu widow in possession is not of such a limited character as is contended for, and that for certain recognized purposes sanctioned by the Hindu law she may make a perfectly good and valid absolute alienation of her deceased husband's estate. I do not propose here to repeat what I said in the Full Bench ruling as to the nature of a Hindu widow's estate, nor in this case does any question arise of an alienation made by her of the kind ordinarily contemplated. I am not now going to decide what would be the position of a stranger third party in whose favor an alienation had been made. I am dealing solely and purely with the case in which two persons having a limited interest in property in the nature more or less of a life interest, one taking by succession after the other, have joined together to allow the party entitled when both of them are dead to succeed to the estate to obtain immediate possession. I think, under circumstances such as these, that the only proper view to adopt and the only view consistent with the Hindu law is, that they have relinquished their several rights to life possession of the property. Then, under such circumstances, can it be said that their action was of such a character as to defeat the title of the plaintiff in the present suit which accrued to him at the date of his mother Musammat Rukmin's demise? So far as Musammat Rukmin was concerned, she could not be heard as against her son, Kharak Singh, to deny his right to possession as against her. But that right would only subsist so long as she remained alive, and with her death the succession, in my opinion, opened up and Duli Singh plaintiff's right as grandson of Bhimjit came into existence, and, in my opinion, had not been destroyed or in any way affected

1892
DULI SINGH
v.
SUNDAR
SINGH.

(1) I. L. R., 6 All, 113.

1892
DULI SINGH
v.
SUNDAR
SINGH.

by the deed of gift of 1872. I see nothing in this view which is inconsistent with the remarks made by their Lordships of the Privy Council in *Raj Lukhee Dabee v. Gokool Chunder Chowdury* (1), nor, so far as I am aware, is this rule other than consistent with the doctrines of the Hindu law. I accordingly think that the issues which the learned Judge remanded were immaterial, and that it was unimportant to consider whether Duli Singh was alive at the date of his grandmother Hira Kuar's death or not. It seems to me sufficient for the purpose of ascertaining his right that he was alive at the date of his mother's death in 1882, when the succession opened up which had been suspended during the lifetime, first of the widow and then of Musammat Rukmin. Under these circumstances I allow the appeal and reverse the order of the learned Judge, remanding the case under s. 562 of the Code of Civil Procedure. I direct the learned Judge to restore the appeal to his file of pending appeals and to determine the other issues, if any, arising before him, taking such action under s. 566 of the Code as may appear to him necessary upon the basis of my preceding remarks that Duli Singh is entitled to maintain the action. The costs hitherto incurred will be costs in the cause.

TYRRELL, J.—I entirely concur in the view of law as laid down by my brother Straight and with the order that he has made in this appeal, and I am the more ready to adopt this view because it will be in harmony with the decree of this Court in another case, not between the same parties it is true, but by which Kharak Singh's interest in his grandfather's estate was judicially limited to a moiety thereof, upon the ground that his brother, Duli Singh, was presumably entitled to the other half of the estate.

Cause remanded.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Mahmood and Mr. Justice Knox.

LEKHRAJ SINGH (PLAINTIFF) v. RAI SINGH AND ANOTHER
(DEFENDANTS).*

1892
March 9.

Act XII of 1881 (N.-W. P. Rent Act). ss. 9, 93, cl. (a), 112A, 161. Landholder and tenant—Occupancy tenant—Suit by landholder against successor of occupancy tenant for arrears of rent which accrued during the lifetime of his predecessor—Jurisdiction—Civil and Revenue Courts.

An occupancy tenant in possession, who has accepted the occupancy holding, is liable to be sued for arrears of rent not barred by limitation which accrued in the lifetime of the person from whom the right of occupancy has devolved upon him.

The suit above referred to is exclusively cognizable by a Court of Revenue.

So held by the Full Bench, Mahmood, J., *dissentiente*.

The following cases were referred to:—By Edge, C. J., *Jyeperkash v. Sheupurshad* (1), *Mata Deen Loobey v. Chundee Deen Loobey* (2), *Mata Deen v. Chundee Deen* (3), *Wazir Muhammad v. Amanat Khan* (4), *Ashraf-un-nissa Begam v. Umrao Begum* (5), *Ahmad-ud-din Khan v. Majlis Rai* (6). By Knox, J., *Ashootosh Chuckerbutty v. Baneemadhub Mookerjee* (7), *Benod Behary Mookhopadhyay v. Beer Narain Roy* (8), and *Hossein Ali Beg v. Ashruff Ali Beg* (9). By Mahmood, J., *Gopal Pandey v. Parsotam Das* (10), *Manadeo Singh v. Bachu Singh* (11), *Wais Ali v. Muhammad Ismail* (12) and *Ahmad-ud-din Khan v. Majlis Rai* (6).

This was a reference under s. 205 of the North-Western Provinces Rent Act (Act No. XII of 1881) made by the Assistant Collector of Aligarh. The suit out of which the reference arose was a suit to recover a certain sum as rent and interest brought under the following circumstances, as stated in the order of reference:—"The plaintiff, Kunwar Lekhraj Singh, is landholder in mauza Bisaro. The defendants are occupancy tenants. Their father was occupancy tenant before them. During his lifetime they did not live with him as a joint family, but separately, and did not share in the tenancy. Their father died at the end of 1888

* Miscellaneous No. 12 of 1891.

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| (1) N.-W. P. S. D. A. Rep., 1884, vol. I, p. 230. | (7) Revenue, Civil and Criminal Reporter, vol. I, p. 26. |
| (2) N.-W. P. H. C. Rep., 1874, p. 118. | (8) Revenue, Civil and Criminal Reporter, vol. I, p. 46. |
| (3) N.-W. P. H. C. Rep., 1870, p. 54. | (9) N.-W. P. S. D. A. Rep., 1865, p. 221. |
| (4) Weekly Notes, 1883, p. 112. | (10) I. L. R., 5 All., 121. |
| (5) I. L. R., 1 All., 512. | (11) I. L. R., 11 All., 224. |
| (6) I. L. R., 5 All., 438. | (12) I. L. R., 8 All., 552. |

1892
 LEKHEAJ
 SINGH
 RAI SINGH.

or the beginning of 1889. The present suit is for rent which fell due in October 1887 and April 1888, that is to say during the lifetime of the defendants' father." The Assistant Collector, being of opinion that he had no jurisdiction to try the suit, referred the question to the High Court in the following form:—"Has a Revenue Court jurisdiction in a suit for arrears of rent which fell due during the lifetime of a deceased representative of the defendants whom they have succeeded as tenants by inheritance and not by survivorship?" On the reference coming before a Bench consisting of Edge, C. J., Straight and Tyrrell, JJ., it was ordered to be laid before the Full Bench of five Judges.

Babu Jagindro Nath Chaudhri, for the plaintiff.

Munshi Ram Prasad, for the defendants.

Mr. T Conlan and *Mr. C. C. Dillon*, on behalf of Government.

MAHMOOD, J.—In this case I have the misfortune of having to begin the judgment, because I regret that I am not agreed with the majority of the Court in the answer which should be given to this reference.

The case arises from facts which are succinctly stated by Mr. Sabonadiere, Assistant Collector, who has referred this case under s. 205 (a) of the Rent Act (Act No. XII of 1881) for a reply to be given by this Court in regard to certain views which he entertained as to the jurisdiction which he possesses. Yesterday the point was considered whether the reference would lie to the District Judge instead of to this Court, but we were unanimous that, under s. 205 of the Rent Act, the Assistant Collector had the authority to refer the case to us through the Collector, as he has done.

Now, I have no doubt that the reference is one with which we can deal under the enactment, namely, the Rent Act above referred to.

The point, however, is one not free from difficulty, and I am anxious as the dissentient Judge to explain exactly why I cannot agree with the views which the majority of the Court are inclined

to hold in regard to the matter, which though pecuniarily small undoubtedly raises important questions for not only the decision of technicalities as to jurisdiction, but also to the rights of parties when questions of this character arise between land lord and tenant.

1892
LEKHRAJ
SINGH
v.
RAI SINGH.

Mr. Sabonadiere states that the question which he has referred arises from the following facts:—

“Kunwar Lekhraj Singh is landholder in mauza Bisaro. The defendants are occupancy tenants. Their father was occupancy tenants before them. During his lifetime they did not live with him as a joint family, but separately, and did not share in the tenancy. Their father died at the end of 1888 or beginning of 1889. The present suit is for rent which fell due in October 1887 and April 1888, that is to say, during the lifetime of the defendants' father.

Now over this matter one thing is certain, namely, that the claim which is brought in the suit out of which this reference has arisen was a claim, as appears from the record, for recovery of Rs. 236-2-0 in respect of the year 1295 Fashi for 80 bighas, and it is a claim for recovery not of rent due by the present defendants but of rent due by their father Amar Singh, who as a matter of fact died before paying up his debts, that is to say, before paying up, *inter alia*, the debt due to the landlord, namely, the present plaintiff in the cause. Now much difficulty in regard to a question of this character arises not from any complications of fact, because they are simple, but from the difficulties which arise out of the somewhat inadequate drafting of the Rent Act (Act No. XII of 1881), and those difficulties I am anxious to explain.

The plaintiff of course as the landlord is anxious to show that because Amar Singh held an occupancy tenure of some sort, not an occupancy tenure such as is contemplated by exproprietary tenancy or by the transferable occupancy, but as land held under the statutory right awarded by the very statute which I am now considering, by s. 8 of the Rent Act. It is a tenancy which amounts to and is subject to all the rights and liabilities which belong to proprietors in land *pro tanto*, that is to say, the right having in the first instance been

1892

LEKHRAJ
SINGH
v.

RAI SINGH.

conferred by the statute, it becomes subject to the ordinary rules of equity, justice and good conscience within the meaning of the phrase as it has already been understood in India. It must be dealt with as the property of a tenant upon whom the right is conferred, and therefore whosoever succeeds to such a right must necessarily be regarded as taking the right subject to all the liabilities which belonged to the original tenancy. For this proposition Mr. *Conlan* who, as *amicus curiæ*, has appeared on behalf of Government has naturally relied upon s. 9 of the same enactment which lays down, among other things that such holdings shall in the first place be non-transferable, and then it goes on to lay down that though they are non-transferable they should be dealt with according to the rules laid down in the last paragraph as if they were land.

Now as to the last paragraph of s. 9, I wish to say that I am most anxious to consider what it means. In the first place, whatever may be the rule of law as to original tenures, as to their being in the occupancy of a tenant by dint either of contract, express or implied, written or oral, the law, as it confers the right of occupancy upon an occupancy tenant in this part of the country, as in Bengal, confers a right which has got nothing to do with contract. It is the creation of a statute, a creation which, irrespective of the wishes of the landlord, and indeed, as we know from the history of the legislation, entirely against his wishes, confers the right to occupy and hold the land, because of twelve years' cultivation pure and simple.

Now this being so, I have to consider further what is the nature of the right which the law has created and in having to consider this it will be simply taking up the time of the Court if I read out all the judgments which I considered in my dissentient judgment in the case of *Gopal Pandey v. Parsotam Dās* (1), where I had to deal with the whole history and policy upon which the right is created.

The judgment unhappily, however, was a dissentient judgment, and since it has been made the subject of consideration in this case

(1) I. L. R., 5 All., 121.

I will read out passages from that judgment so as to incorporate them in this judgment. At page 128 of the report I said :—

1892

LEKHRAJ
SINGHv.
RAI SINGH.

“Whatever the rights of tenants may originally have been in these Provinces, Act X of 1859 was the first legislative enactment which recognised or conferred the rights of occupancy upon cultivators who had occupied their holding for twelve years and upwards. Section 6 of that Act virtually declared the right to be heritable, but left the question of transferability of the tenure unprovided for. Numerous rulings, more or less conflicting, are to be found in the reports. It was held by a Full Bench of the Calcutta High Court that the right was not transferable; that it was a right to be enjoyed by the person who held or cultivated and paid the rent, and had done so for a period of twelve years; that the right was only to be in the person who had occupied for twelve years, and was not intended to give any right of property which could be transferred. *Narendra Narayan Roy Choudhry v. Ishan Chandra Sen* (1).

“The same view had been previously taken by Phear, J., in the case of *bibes Sohodra* (2). That learned Judge in examining the nature of the right of occupancy compared it to the relation which obtains between the right of ownership of land in England and the servitude or easement which is termed *profit a prendre*. He further observed that the ryot's was the dominant and the zamindar's the servient right; that whatever the ryot had, the zamindar had all the rest, which was necessary to complete ownership of the land; that the latter must, therefore, have such a right as would enable him to keep the possession of the soil in those persons who are entitled to it, and to prevent it from being invaded by those who are not entitled to it.

“Whilst such was the nature of the right to which occupancy tenants were held to be entitled merely by force of the statute, it had been held, both by this Court and by the High Court of Calcutta, that local custom would entitle the occupancy tenant to transfer his holding, in other words, the question of transferability

(1) 13 B. L. R., 282.

(2) 12 B. L. R., 82.

1892
 LEKHRAJ
 SINGH
 v.
 RAI SINGH. was to be determined with reference to the original nature of the tenure, irrespective of the statutory provisions, which were not understood to deprive tenants of such customary or other rights as they possessed before the passing of Act X of 1859. The *status* of occupancy tenants was therefore variable and indefinite, and being thus involved in uncertainty was liable to create the mischief which arises from imposing upon the Courts, charged with deciding such suits, the duty of ascertaining local custom in every case in which the tenant chose to plead it—customs which in India are far from being fixed or easily ascertainable.

“Such was the state of things found by the Legislature in 1873, when the Rent Act of that year was passed. The preamble to that Act shows that its objects were of a wider scope than those with which Act X of 1859 was enacted. The object of the Act of 1873 was not only to consolidate, but to *amend* the law relating to the recovery of rent in these Provinces. It is therefore with reference to the provisions of that Act, which are more specific and clear, that the nature of the right of occupancy should be determined, and it is to be observed that the question of transferability is no longer left unprovided for by the Legislature.

“The manner in which the right of occupancy comes into existence is described in s. 8 of the Act. The right is acquired by the tenant merely in virtue of occupying or cultivating land continually for twelve years ; in computing the period, the occupation or cultivation by the ‘father or other person from whom the tenant inherits,’ is also taken into calculation, and the whole rule is subject to certain provisions, which need not be considered for the purposes of the present cases. The right which thus comes into existence confers definite benefits on the tenant. He ceases to be a tenant-at-will ; the rent payable by him cannot be enhanced by the mere wish of the landlord (s. 12) without special grounds (s. 13) ; he can apply for abatement of rent on showing adequate grounds (s. 15) ; the entire question of the amount of rent no longer remains a matter of discretion with the landlord, but is regulated by definite rules (ss. 16 and 17), though the landlord and tenant can by mutual

agreement fix such amount (s. 22) for such term as may be agreed upon. Further, the tenant can claim a lease from the landlord at the rate paid by him (s. 26); he cannot be ejected except on the ground of the non-payment of arrears of rent and other definite grounds specified in the Act. In short, while the landlord still continues to be the owner of the land, the tenant acquires a right to occupy and cultivate the soil wholly irrespective of the assent or permission of the landlord, so long as the provisions of the Act are conformed to.

1892
LEKHRAJ
SINGH
v.
RAI SINGH.

"Now these statutory provisions which, on the face of them, appear to relate only to the province of procedure or adjective law on the subject of recovery of rent, have, in reality, the effect of creating a substantive right in favour of the tenants. It has been said that the nature of that right is only a personal one, because, as is contended, it belongs to the tenant personally and dies with him. This contention is no doubt in a measure supported by the view expressed by Couch, C. J., in the Full Bench ruling in the case of *Narendra Narayan Roy Chowdhry* (1). But that ruling was passed under Act X of 1859 and Bengal Act VIII of 1869, the provisions of which were vastly different to those of Act XVIII of 1873. I confess I can take no such view of the right of occupancy under the provisions of the last-mentioned Act. The idea of a personal right has been variously defined by jurists, to whom it is known by the term *jus in personam*, but in all those definitions the essential principle is recognised that such right avails exclusively against persons specifically determinate. In the case of an occupancy tenant the right created in his favor by the statute is not a right which binds the landlord alone; in other words, it is not a right which has for its correlative the obligation of only the landlord of the soil. On the contrary, it is a right in land, a right which avails against all persons universally. It is therefore not a *jus in personam*, and it is clear that it cannot be called a *jus ad rem*, for that class of right is only a species of personal right and implies the right of compelling a determinate person or persons to do any

(1) 13 B. L. R., 287.

1892

LEKHRAJ
SINGH
v.
RAI SINGH.

specific act, the commission of which would confer a real right known in the language of jurisprudence* as *jus in rem* or a permanent right in and over a thing which forms the subject of the right. In the case of an occupancy tenant, the right which the Legislature has conferred upon him under Act No. XVIII of 1873 is such as, subject to the limitations provided by the statute, prevails against all the world. The subject of the right is the land held by the tenant, and, whatever changes the ownership of that land may undergo, the occupancy right subsists in and goes with the land. The right no doubt falls far short of absolute ownership or *dominion* defined by Austin to be a 'right over a determinate thing indefinite in point of *user*, unrestricted in point of *disposition*, and unlimited in point of *duration*.' But 'one or more of the subordinate elements of ownership, such as a right of possession or user, may be granted out while the residuary right of ownership—called by the Romans *nuda proprietas*—remains unimpaired. The elements of the right which may thus be disposed of without interference with the right itself—in other words, which may be granted to one person over an object of which another continues to be the owner—are known as *jura in re aliena*' (Holland on Jur., p. 144). Thus *Jura in re aliena* are such of the rights *in rem* availing against the world at large as are acquired over and in the absolute ownership or *dominion* of another person in whom the ownership still continues. Among such rights was a right known to Roman Jurisprudence as *emphyteusis* which has been defined to be 'the right of a person who was not the owner of a piece of land to use it as his own in perpetuity, subject to forfeiture on non-payment of a fixed rent and on certain other contingencies.' It appears to me that the right of an occupancy tenant in these Provinces resembles the *emphyteusis* of the Roman Law. It is a right carved out of the proprietary estate of the Zámíndar by the operation of the statute, as indeed it might have been by grants from the landlord himself. That such was the nature of the right of occupancy intended to be conferred by the Legislature upon tenants of twelve years' standing seems to me to be clearly shown, not only by the general provisions of the Rent Act, but by the express language of a clause in s. 9.

That clause lays down that 'when any person entitled to such last mentioned right dies, the right shall devolve as if it were land.'

1892

Moreover, as shown by s. 8, the tenant acquires the right of occupancy not only by virtue of his own cultivation, but also by virtue of the continuous cultivation or occupation of the land by the person from whom he inherits. Under s. 9 the right is capable of devolution by inheritance and also of transfer by act of parties, but both these capabilities are subject to the limitations provided by that section. It provides that the right of occupancy shall not 'be transferable by grant, will or otherwise, except as between persons who have become by inheritance co-sharers in such a right.' These limitations, however, do not alter the nature of the right so as to take it from one class of rights recognised by jurisprudence into another class. Therefore, according to my view, the holding of an occupancy tenant must, for the purposes of the present question, be regarded as land, or any other real and substantive interest in immovable property. If any light can be thrown upon this question by the provisions of the laws other than the Rent Act itself, I should say that the rules of procedure in regard to the territorial jurisdiction and limitation applicable to a suit by an occupancy tenant for recovery of possession of his holding from a trespasser proceed upon the principle that the tenant's right is immovable property and must be treated as such for purposes of procedure."

LEKHNATH
SINGH
T.
RAI SINGH.

I have quoted these long passages from my long judgment for no reason other than that of showing the principle upon which my judgment proceeds, namely, the appreciation of what the Legislature intended by the right called occupancy tenure. The judgment unhappily was a dissentient judgment, as this one is, but I still adhere to the views I then expressed in connection with, not the recognition, but the creation of the right of occupancy. It is a matter of the history of legislation to which I as a Judge can refer, namely, that it was the policy of Government at the time expressed by its legislative enactment of 1859, soon after the troubles of 1857, that persons who were in possession of the land must not be easily ousted, that difficulties must be placed in

1892
LEKHRAJ
SINGH
v.
RAI SINGH.

the power of landlords and zamindars for procuring the ouster, and therefore, not with the consent, not with the desire, but indeed against the wishes of the zamindars, namely, landlords, the Act No. X of 1859 was passed conferring the right, whether created by custom or by dint of twelve years' possession. The right thus created was a right intended to devolve like land. It was not intended to vest like land. The object of the Legislature was simply to keep a certain class of population which cultivates certain parts of the land on the soil. It is not for me to say whether the policy was right or wrong, but it is clear from the history of legislation that this was the object of the Legislature. Therefore two consequences followed ; one was the conferring of the right, and the other was to disable a party who held such right from being able to transfer it, though he might wish to do so as much as he could. The agricultural population of India is a population which has not enough advancement of mind to understand its own interests, and it is obvious to me, reading through the whole history of the legislation, that it was intended that no man by his want of prudence, being an agriculturist, should cease to be the tenant of the land by transferring it. This is clear from s. 9 of Act No. XII of 1881.

Now this being the nature of the right, the exact question before me becomes simple, and it is this : is the misbehaviour or imprudence or extravagance of an occupancy tenant to be any reason for the ouster of his son or any other person upon whom the tenure would devolve within the meaning of s. 9 of the Rent Act ? So far as I am concerned, I have absolutely no doubt that such was not the intention of the Legislature. When an occupancy tenant who cannot be turned out by the landlord at his will, and in the way of turning him out difficulties and use of formalities required by the enactment are placed, chooses to misbehave and to die before paying up the rent due from him, his sins do not fall upon his son or his heirs, because, although the tenancy is an occupancy tenure and devolves like land, yet an occupancy tenure in this country was created to prevent such contingencies. It was so created

because, unhappily, the agricultural population of India has not yet advanced enough to understand its own interests, otherwise there is no reason either of legislative or other consideration which would take away from a man the power of conveying his own rights such as those in an occupancy tenure. We know that in England a lease-holder can convey land, and the assignee takes subject to all the conditions of the lease, subject to all the impediments and legal liabilities which the lease was subject to.

1892
LEKHRAJ
SINGH
v.
RAI SINGH.

But such is not the case in regard to occupancy tenures, and any questions which arise in regard to covenants running with the land, as they are called, do not apply to this right because it does not devolve like any other land. The right is personal to the man, namely, the present defendant. He derives it by reason of certain qualifications which are required by the law, namely, by reason of their being father and son, but the fact that this qualification is required by the statutory right does not create any privity of land between himself and his father *qua* a tenant. The tenancy is free to devolve upon him by dint of the statute because if the statute meant to render him liable, the word used would have been *inherit* and not *devolve* as it is in s. 9 of the Rent Act.

But this is not, in my opinion, the intention of the Legislature, and I hold that upon the death of an occupancy tenant those who succeed him in the tenure have no privity with the deceased tenant, but that they derive a right independently for themselves by reason of being qualified for the statutory right which s. 9 of the Rent Act contemplates. It follows therefore that no covenants made by the predecessor in the occupancy tenure and no obligations incurred by him can fall upon his successor.

In laying down this rule some difficulty may arise over transferable occupancy tenures such as those contemplated by s. 7 of the enactment. I have no difficulty, so far as I am concerned, in explaining the incidents that may arise in regard to that class of tenures and extending the same principles as those upon which I

1892 am dealing with this case, but the question under that section does not arise here.

LEKHRAJ
SINGH

v.
RAI SINGH.

Now, how does the matter stand? The matter is that Amar Singh, an occupancy tenant, died, leaving, I do not know whether he left other property, a debt due by him to the plaintiff, landlord. The debt was a subsisting one for which remedies are apparently provided by the Rent Act (Act No XII of 1881) by the summary procedure of the Act so long as he lived. Those remedies were never employed against him. His crops which were liable primarily for the payment of rent were never distrained. No remedy such as the enactment confers was ever sought for by the landlord, zamindár. The man died, and the question is whether upon his death his sons could be brought into the Rent Court for being dealt with as if they were Amar Singh themselves.

I have no doubt they cannot. The enactment itself specifically deals with remedies, and where it creates rights it is most anxious to define them. There is not one word in the enactment to show that suits such as those contemplated by s. 93 or s. 95 of the Rent Act are to be instituted against the heirs or representatives or other persons other than the original tenants. Reliance has been laid upon the last paragraph of s. 112 A of the Rent Act, which says that "when a defendant dies and the suit is continued against his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted against the deceased defendant."

I am, however, relieved from the difficulty of considering this matter, because in this case admittedly the suit was commenced after the death of the tenant, the tenant being never a party to the suit, and the quarrel, the subject of the reference, relates to a dispute between a man who at one time was subject to the jurisdiction of the Rent Act and his landlord. Notwithstanding the section, a son or other successor to an occupancy tenant may possibly raise pleas in an action of this character as the legal representative, upon the ground that the cause of action does not survive.

Be it as it may, the immediate question before me is whether the Civil Court has jurisdiction in regard to the dispute as represented by the pleadings of the parties and as it is before me. Now, in the case of *Mahadzo Singh v. Bechu Singh* (1) I took some trouble to explain how the provisions of a general enactment are to be considered as imperative till it is shown that by special enactment the power of jurisdiction is taken away. The general enactment is the present Code of Civil Procedure (Act No. XIV of 1882), and it can, as such, of course be abrogated by any special enactment, but in s. 11 it says that the Civil Courts "shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is barred by any enactment for the time being in force."

1892

LEKHRAJ
SINGH
v.
RAI SINGH.

Now there is a maxim of law which says that special enactments may abrogate the general enactments. The abrogation here which Mr. Conlan relies upon lies in s. 93 of the Rent Act (Act No. XII of 1881) and in the point now before me relates to clause (a) of the section, because the first part of it is clear enough as to the ouster of jurisdiction.

The difficulty then is, is the present suit a suit for arrears of rent? It was contended, and, I may say, with much emphasis, by Mr. Conlan that the word "rent" being used there is generic, that therefore it must be taken to mean not only rent due actually by the occupancy tenant now in possession, but also by his ancestor, so that a suit of this nature is a suit of this character within the meaning of this section which must be dealt with, because the occupancy tenure being under s. 9 a tenure which devolves like land, a great-grandfather dies, a grandfather dies, a father dies and the son is in possession, then under the enactment, as the necessary legal result of Mr. Conlan's argument, the Rent Court has power to deal with liabilities as to arrears of rent, to deal with questions which may involve the administration of various estates which I have considered for bringing out the point of law.

There is one more point in the matter, and it is this. If the word "rent" did mean as Mr. Conlan argued it meant, I should

(1) I. L. R., 11 All., 224.

1892

LEKHHRAJ
SINGHv.
RAI SINGH.

have consented to his contention. But it cannot be that, because the word "*rent*" is not to be understood in the English sense of rent nor is it the same as "rent charge," which again is a most complicated term of the English law, but it must be understood as rent within the meaning of the Rent Act. To understand what "*rent*" means and what may be the meaning within the meaning of the statute, we must consider the several remedies provided by law for recovery of rent. In regard to this matter I may *perforce* refer to the ruling in *Waris Ali v. Muhammad Ismail* (1), where I had the misfortune of differing with Mr. Justice Oldfield in regard to the meaning of the word "*rent*." There it was actually contended and actually held by my learned colleague that mimicry was rent within the meaning of the enactment, and that because it was rent, therefore, all the rules applicable to the recovery of rent were applicable to that case. I have in this case also the misfortune of differing from my learned brethren.

This being the difficulty which arises over the question as to the definition of rent, we may refer to the provisions of clause (2) of s. 3 of this somewhat loosely drafted enactment. There rent is defined in the following words :—

" 'Rent' means whatever is to be paid, delivered or rendered by a tenant on account of his holding, use or occupation of land."

Now this being so, I have been unable to conceive upon what ground it can be held that the word "*rent*" as used in clause (a) of s. 93 of the Rent Act can be understood in any sense other than that in the definition. Now what is rent is rent due by the tenant and not by his heirs, on account of his holding, not on account of his heirs' holding, use or occupation of land. Similarly the suit contemplated by s. 93 (a) is a suit which can be against the tenant himself and not against his heirs, and indeed this is the principle of the *ratio* upon which the Full Bench of this Court proceeded in *Ahmad-ud-din Khan v. Majlis Rai* (2) over a cognate question.

Now I have said enough to show that for the purpose of maintaining an action under s. 93 (a) of the Rent Act (Act No. XII of 1881)

(1) I. L. R., 8 All., 552.

(2) I. L. R., 5 All., 438.

it is not a suit for rent, because for purposes of the enactment the defendants were not the occupancy tenants, of the land during the period for which the rent is claimed. Amar Singh's death may or may not render his estate liable for payment of what was due from him by reason of the occupancy tenure, but it is a question which is not excluded from the cognizance of the Civil Courts of Judicature, because it is a question which may involve the administration of the estate, and is a question which the Rent Act does not contemplate should be committed to the summary trial of the Rent Courts.

1892
LEKHERAJ
SINGH
v
RAI SINGH.

This being so, I respectfully think that the cause and dispute as represented in this case was a cause which did not fall within the purview of clause (a) of s. 93 of the Rent Act, and there was no abrogation of the general jurisdiction of the Civil Court and that therefore the cause lay where it should have lain under the general law and procedure in a Court which can deal with the administration of estates and which can deal with questions of equities arising in the case.

My answer to the question therefore is that Mr. Sabonadiere was right in the opinion that he had no jurisdiction as a revenue officer to entertain the suit, and that Mr. LaTouche, the Collector who differed from him, was wrong in holding that it was a suit capable of being entertained by the Rent Court. This is my answer to the reference.

EDGE, C. J.—This is a reference under s. 205 of Act No. XII of 1881 made by Mr. Sabonadiere as the presiding officer of the Court of Revenue in which the suit to which the reference relates was pending. The reference was forwarded to the Court through the medium of the Collector. The question which we have to determine here is, can a suit for arrears of rent be brought by the landlord against the person upon whom the right of occupancy has devolved, the arrears having accrued during the lifetime of the prior occupancy tenant? The answer to the question in my opinion depends upon the construction of s. 93, clause (a) of Act

1892 No. XII of 1881. The section, so far as it bears upon the question before us, is as follows :—

LEKHRAJ
SINGH

^{v.}
RAI SINGH.

“Except in the way of appeal, as hereinafter provided, no Courts other than Courts of Revenue shall take cognizance of any dispute or matter in which any suit of the nature mentioned in this section might be brought, and such suit shall be heard and determined in the said Courts of Revenue in the manner provided in this Act, and not otherwise: (a) suits for arrears of rent, or, where rent is payable in kind, for the money equivalent of rent, on account of land or on account of any rights of pasturage, forest rights, fisheries or the like.”

Now it is to be observed that according to the plain reading of the section no suit of the nature of a suit for arrears of rent on account of land can be brought in any Court other than the Court of Revenue. There is absolutely no limitation placed upon the wording of the section other than the limitation which is to be found in s. 1 of the Act, which limitation does not apply in this case. In my judgment the answer to the question merely depends on the question of fact, was or was not the suit which was before Mr. Sabonadiere a suit for arrears of rent on account of land? It certainly, according to the plain understanding of the English language, with which there is nothing inconsistent in Act No. XII of 1881, was a suit for arrears of rent on account of land, that is, a suit in which the plaintiff sought a decree for arrears of rent which he alleged to be due to him on account of land. There is nothing in the section, so far as it relates to suits for arrears of rent, to indicate that the section applies only where the person suing was the person who was the landholder or landlord at the time when the rent became due, nor is there anything in the section to indicate that the person to be sued in a suit for arrears of rent must necessarily be the person who occupied the position of tenant at the time when the rent, the arrears of which are sued for, became due. According to the plain English of the section it applies to all suits in which it is sought to recover arrears of rent on account of land, that is to say, to all suits for rent in

respect of holdings to which Act No. XII of 1881 applies. I would be content, so far as I am concerned, to rest my judgment in this case on the plain reading of the section. But several cases have been relied upon in the course of the argument as bearing upon the question, and I think it necessary to point out here how far, if at all, they affect the question immediately before us. I think it is also advisable to point out, that there is in my judgment nothing in Act No. XII of 1881 which is inconsistent with the plain construction of clause (a) of s. 93.

1892
LEKHRAJ
SINGH
v.
RAI SINGH.

The person who sues here is a landlord to whom the rent sued for became due. The person who is being sued is the present occupancy tenant of a holding held under the plaintiff, and is being sued in respect of arrears of rent which accrued in the lifetime of his father, the then occupancy tenant, who died before the institution of the suit. Referring to s. 9 of Act No. XII of 1881, we find that a right of occupancy other than the right of a tenant at fixed rates devolves as if it were land. In what I shall say in this judgment it must be understood that when I refer to a right of occupancy I refer to such a right of occupancy as devolves under s. 9 as if it were land. Now what is such right of occupancy? It is a right to occupy land subject, amongst other conditions, to the condition of paying the rent which may be payable for the time being in respect of the land. The right of occupancy cannot be regarded as a right to occupy the land independent of the condition for the payment of rent, and when a right of occupancy devolves under s. 9, it appears to me that it devolves in its integrity, that is to say, carrying with it, amongst others, the condition as to payment of rent. The person upon whom the right of occupancy devolves is not bound to accept the tenancy, but, if he does accept it, he, in my opinion, must accept it subject to its burdens, and one of those burdens is the legal liability to pay the rent which is in arrear and a suit for which is not barred by limitation.

If such person elects not to accept the right of occupancy his liability would be limited to that of a legal representative to

1892

LEKHRAJ
SINGH
v.
RAI SINGH.

whom assets had come. I think it would be correct to say that the condition to pay rent due and in arrear, which was part of the contract of occupancy, followed the land and affected the person upon whom the right of occupancy devolved and who accepted the position of an occupancy tenant in succession. It is obvious to my mind that the Rent Act contemplates that a landlord shall have a remedy by way of ejectment in case of non-payment of rent by his tenant where the tenant is an occupancy tenant. But in order to exercise the right of ejectment, which in such a case could only be done under Act No. XII of 1881, it would be necessary for the landlord to first obtain a decree for the rent in arrear. The decree which would enable the landlord to apply for ejectment is a decree for rent in arrear passed by a Court of Revenue, and not by a Civil Court. Consequently, if the landlord in the present case was compelled to bring his suit in the Civil Court and has not got his right of suit in the Court of Revenue for the rent which became due in the lifetime of the deceased occupancy tenant, and which is still in arrear he might lose those arrears by reason of there being no assets, and yet never could obtain, under the present condition of the law, a decree for the rent so in arrear, upon which he could apply to the Court of Revenue to eject the occupancy tenant in possession upon whom the right of occupancy has devolved under s. 9 of the Act. In such a case, and if the law is as it has been contended it is, the landlord might be left without any remedy. He could neither obtain payment of the rent due by the deceased occupancy tenant and in arrear at his death, nor obtain possession of the land which was held on the condition that the rent payable for it should be paid. To my mind those considerations suggest that it was clearly the intention of the Legislature, as indeed they expressed it, that all suits for arrears of rent should be entertainable by the Courts of Revenue, and by the Courts of Revenue only, no matter who might be the parties to those suits. It was suggested in the course of the argument that if a suit for arrears of rent against the legal representative of a deceased occupancy tenant was entertainable in a Court of Revenue it might be necessary for that Court to enter into an inquiry

as to the assets and as to other matters which a Civil Court would be the more suitable tribunal to deal with. But s. 112A contemplates the carrying on of a suit on the death of the tenant and the carrying on of the suit by making his legal representative a party to the suit as defendant. Further, s. 161 of Act No. XII of 1881 obviously means that where a decree under the Act has been obtained and the judgment-debtor has died before execution, his heir or other representative may be made a party for the purpose of enabling the judgment-creditor to execute his decree, so that in either of these two cases it is possible that a Court of Revenue might have to consider the very matters which, it is suggested, can only properly be considered and dealt with in a Civil Court. Shortly, in my opinion, according to the Act, the occupancy tenant in possession who has accepted the occupancy holding is liable to be sued for arrears of rent not barred by limitation which accrued in the lifetime of the person from whom the right of occupancy has devolved upon him. I shall now shortly refer to some of the principal cases which were cited before us in the argument. The first case to which I shall refer is *Jyeperkash v. Sheupurshad* (1). In that case as the law then stood it was held that an assignee of rent could only sue to recover the rent which had been assigned to him by bringing his suit in the Court of Revenue, and that the Civil Court could not entertain such a suit. That is in accordance with the principle which, in my judgment, underlies Act No. XII of 1881, namely, that all suits of the nature of suits for arrears of rent must be brought in the Court of Revenue and in the Court of Revenue only. In the case of *Mata Deen Doobey v. Chundee Deen Doobey* (2) the plaintiffs, who were recorded proprietors of a share, sued after their father died, under Act No. XIV of 1863, to recover profits which had accrued before their father's death. Sir Robert Stuart, C. J., and Spankie, J., differed; Stuart, C. J., holding that the suit was maintainable in the Civil Court only, Spankie, J., holding that the suit was maintainable in the Court of Revenue only. In the case of *Mata Deen v. Chundee*

1892

LEKHEEJ
SINGH
v.
RAI SINGH.

(1) N.-W. P., S. D. A., Rep., 1864, Vol. I, p. 230.

(2) N.-W. P., H. C. Rep., 1874, p. 1.8.

1892

LEKHRAJ
SINGH
v.
RAI SINGH.

Deen (1) it was decided that a lambardár was not chargeable in the Court of Revenue in respect of profits which had become due and payable at a time prior to his appointment, although he succeeded his father in the office. The case apparently turned on the wording of a clause in Act No. XIV of 1863 which related to suits by or against lambardárs. In the case of *Wazir Muhammad v. Amanat Khan* (2) it was held that the heirs of a deceased lambardár could not sue to recover in respect of revenue paid by the lambardár. The decision turned on the wording of clause (g) of s. 93 of Act No. XII of 1881, which apparently relates solely to suits by a lambardár himself, and not by his heirs. It was in my opinion a perfectly right decision having regard to the clause which applied in the case. The next case to which we were referred was the case reported in the note to the case of *Bhikhan Khan v. Ratan Kuar* (3). It was a suit by a co-sharer, not apparently against the lambardár, but against a person who had intermeddled by dealing with the profits of the mahál. The case in my judgment depended on some of the clauses of the Rent Act then in force, and has, so far as I can see, no bearing upon the construction to be put on s. 93, clause (a), Act No. XII of 1881. I next come to a case which was much pressed upon us, namely, *Ahmad-ud-din Khan v. Majlis Rai* (4), in which it was decided that a suit by the heirs of deceased co-sharer against the heirs of a deceased lambardár for money claimed as profits due to the deceased co-sharer by the deceased lambardár was a suit which was cognizable by the Civil Court, and not by the Court of Revenue. Now that decision turned upon clause (h), s. 93 of Act No. XVIII of 1873, in which the word introduced into Act No. XII of 1881, namely, "recorded" was not to be found. I may say that I am of opinion that the co-sharer mentioned in clause (h) of s. 93 of Act No. XVIII of 1873 meant recorded co-sharer.

I entirely agree with the decision that a suit by a person who was the heir of a recorded co-sharer, but was himself not a recorded

(1) N.-W. P., H. C. Rep., 1870, p. 54.

(2) Weekly Notes, 1883, p. 172.

(3) I. L. R., 1 All., 512.

(4) I. L. R., 5 All., 438.

co-sharer, did not lie in the Courts of Revenue for profits. That case, as most of the others, turned upon the special wording of clauses which do not apply to the suit in the present case. There were one or two other authorities referred to in the course of the argument to which I do not think it necessary to refer in my judgment, as they have no direct bearing on the question before us, and as I think that the answer to the reference is really to be ascertained by the plain construction of clause (a), s. 93, Act No. XII of 1881. I would accordingly answer the question by saying that the suit in question is one not cognizable by the Civil Courts and is cognizable by the Courts of Revenue only.

1892
LEKHRAJ
SINGH
v.
RAI SINGH.

TYRRELL, J.—I entirely concur with the learned Chief Justice.

KNOX, J.—The question put to us for answer is whether the Revenue Courts have jurisdiction in suits for arrears of rent which may have fallen due during the lifetime of a deceased tenant and which may be claimed by the landlord from the persons who have succeeded as tenants by inheritance, and not by survivorship. The question does not in terms refer to the fact that it is a question which has arisen out of a suit brought by a landlord against a tenant with right of occupancy, or rather the successor to such tenant, but it is evident from the reference, and it is with regard to such case alone that I make the answer, and my answer would be that the Revenue Courts alone have jurisdiction. It is beyond all doubt that s. 93 of Act No. XII of 1881 confers upon Courts of Revenue the jurisdiction to take cognizance of any dispute or matter which may arise between the landlord and tenant having a right of occupancy when such a matter relates to arrears of rent, and I do not think that I am forcing the language of the Act at all when I understand from it that the Act confers jurisdiction over all disputes relating to matters of rent between persons who at the time when the suit is brought are holding towards each other the position of landlord and tenant. It follows from this that the jurisdiction of the Civil Courts is *prima facie* and in terms excluded from taking cognizance of such suit. Now this being so, is there anything as contained in s. 93 or elsewhere in the Act to take such a suit as

1892

LEKHRAJ
SINGH

v.

RAI SINGH.

this which has been made the subject of this question out of the revenue jurisdiction ? I can find no such provision.

It has, however, been contended that the successor by inheritance to a deceased tenant, whose tenure was of the class referred to in and contemplated by s. 8 of Act No. XII of 1881, is not the tenant of the landlord so far as arrears which accrued due from his predecessor in interest are concerned, and it is then contended that the Revenue Courts are deprived of jurisdiction. It seems to me that to concede such a construction of the language contained in s. 93 is in effect to place a limit upon language which is in terms very wide and a limit which was not contemplated or intended by the Legislature. The claim of a landlord for arrears of rent brought in this form can only, and must always, be a suit for arrears of rent against whomsoever it may be brought. The person sued as defendant may indeed plead in answer that he is not the tenant of the plaintiff and has never attorned to him, and if it be so found the jurisdiction of Revenue Courts fails. But if the pleadings disclose that the defendants had succeeded to the position of the tenant by the time the suit has been brought and had accepted the liability of the tenant to the plaintiff as landlord, the question must still remain whether the defendants had accepted the liability to arrears of rent which accrued due before his tenure commenced. But on such pleadings in my opinion the suit will still be a suit for arrears of rent, and being such a suit no Court other than a Court of Revenue can take cognizance of it. It will be in fact for the Revenue Court, and the Revenue Court alone, to determine whether the defendant before us is or is not liable for the sum claimed as arrears of rent.

I am fortified in this view by the history of the past legislation on the question of landlord and tenant. So far as I can discover, from the earliest times in which the question has been made the matter of legislation by the English Government, all matters in dispute touching arrears of rent between landlords and tenants were removed from the ordinary jurisdiction of Civil Courts and made the subject of special enactment. There was indeed one

attempt made, and only one, so far as I can find, to place suits of this kind on the same footing as ordinary civil suits. It was in Regulation XVII of 1793, and the only preference given to suits of this nature was that they were invariably to be heard and determined prior to any suits of other kinds which might be then pending before the Courts. It was, however, found that this expedient was of no practical value where the object was to provide speedy remedy. Regulation XLV of 1795 in its preamble states that there had been found in the Regulations as they then existed defects tending to screen oppression and dishonesty on the one hand and to discourage moderation and good faith on the other, and it was essential to the prosperity of the country and the punctual collection of the public revenue that landholders and farmers of land should have the means of speedy remedy for recovery of rent, special powers were sanctioned by law which enabled landholders to recover rent without the delay and expense necessarily attending a law-process for the recovery of every arrear. This expedient, however, failed also, and Regulation VIII of 1831 was placed upon the statute book, which expressly provided that summary claims connected with arrears of rent should be preferred in the first instance to Collectors of Land Revenue. After several intermediate Regulations bearing upon the subject and with the same end in view, Act No. X of 1859 was enacted. Act No. X of 1859 was not an Act curtailing the powers of Collectors, but, as its preamble shows, it was specifically enacted to extend the jurisdiction to Collectors in connection with the demands of rent and other questions connected with the same, and thus we come to an end of what was known as the summary jurisdiction and summary rights. Act No. X of 1859 and the Acts which follow it are acts providing elaborate and special machinery for the trial of rent suits amongst other matters. Act No. X of 1859, so far as the provisions contained in it for recovery of arrears of rent are concerned, and they will be found in s. 23 of the Act, will be found to differ in no material way from Act No. XVIII of 1873, which is described as an Act for the consolidation and amendment of the law relating to recovery of rent. Act No. XII of 1881, which is the enactment at present in force, is described

1892

LEKHRAJ
SINGHP.
RAI SINGH.

1892

LEKHRAJ
SINGH
v.
RAI SINGH.

as an Act to amend the law relating to recovery of rent. But I find nothing in any of these Acts which encourages the view that the ample and express jurisdiction which was conferred upon Collectors of Land Revenue by Act No. X of 1859 has been in any way curtailed or restricted. The object of all the legislation was over and over again described in the Regulation as being the promotion of peaceful and equitable relations between the superior and inferior classes of agricultural population and the supply of prompt remedies for the differences which would otherwise impede the punctual realization of the Land Revenue. Moreover it seems to me that the view I have taken is consistent with the view which was taken, both in these Provinces and in Lower Bengal, when Act No. X of 1859 was for many years in force. Both the Calcutta High Court and this Court appear to have entertained no doubt as to the jurisdiction of the Revenue Courts to determine suits relating to arrears of rent, even in cases where the plaintiff might not be the then landlord, but an assignee of or holding some similar position from the landlord. Thus I find that in 1865 the Calcutta High Court in the case of *Ashootosh Chuckerbitty v. Banee-madhub Mookerjee* (1) held that the Revenue Court had jurisdiction, even when the defendants pleaded that the claim was not one for rent, but for money due upon contract, and therefore beyond the cognizance of the Revenue Court. The case was one in which the defendant had covenanted in his *kabuliat* to become liable for certain outstanding rents due before he had taken the lease. Then there is the case of *Benod Behary Mookhopadhya v. Beer Narain Roy* in the same volume, page 46, in which that Court held that the Revenue Court had jurisdiction where a rent decree had been purchased from the landlord and the purchaser of the decree found it necessary to continue the litigation in the rent Court. There is a case in which the Sadr Diwani Adalat of these Provinces in 1865, namely, in the case of *Hossein Ali Beg v. Ashruff Ali Beg* (2) held that a sharer in possession of his share at the time of his suit may claim in the Revenue Court the profits

(1) Revenue, Civil and Criminal Reporter, Vol. 1, p. 26.

(2) N.-W. P., S. D. A. Rep., 1865, p. 221.

of his share for a previous period during which he was not in possession. There are other cases to the same effect, but I only quote these by way of analogy. For these reasons I agree in the answer given by the learned Chief Justice.

1892

LEKHHRAJ
SINGHv.
RAI SINGH.

STRAIGHT, J.—I only wish to say this, that though my mind is not wholly without doubt, I am not so satisfied as to the correctness of the contrary view as to justify me in differing from the majority.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Mahmood, and Mr. Justice Knox.

ALI ABBAS AND ANOTHER (PLAINTIFFS) v. KALKA PRASAD
(DEFENDANT).*

1892

March 16.

Regulation No. XVII of 1806, ss. 7 and 8.—Mortgage by conditional sale—Foreclosure—Pre-emption, suit for—Limitation—Act XV of 1877 (Indian Limitation—Act) sch. ii, art. 120.

Where a mortgage by conditional sale had been duly foreclosed in accordance with the procedure laid down in ss. 7 and 8 of Regulation XVII of 1806 and at the expiration of the year of grace a portion of the mortgage money remained unpaid:—held in a suit for pre-emption of the mortgaged property that the title of the conditional vendee became absolute on the expiration of the year of grace, and that the plaintiff's right of pre-emption accrued and limitation began to run against him from the expiration of such year of grace. *Forbes v. Ameeroonissa Begum* (1) distinguished: *Raisuddin Chowdhry v. Khodu Nawaz Chowdhry* (2); *Joikaran Rai v. Ganga Dhari Rai* (3); *Moonshi Syud Ameer Ali v. Bhabo Soonduree Debia* (4); *Mohunt Ajoodhya Pooree v. Sohum Lal* (5); *Jeeerakhun Singh v. Hookum Singh* (6); *Buddree Doss v. Durga Pershad* (7); *Mussamat Tara Kunwar v. Mangri Meea* (8); *Hazari Ram v. Shankar Dial* (9); *Tawakkul Rai v. Lachman Rai* (10); and *Ajaib Nath v. Mathura Prasad* (11); referred to: *Prag Chaubey v. Bhajan Chaudhri* (12); *Rasik Lal v. Gajraj Singh* (13); and *Udit Singh v. Padarath Singh* (14) overruled.

THIS was a reference made to the Full Bench by Tyrrell and Knox, JJ. The facts of the case sufficiently appear from the order of reference, which is as follows:—

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| (1) 10 Moo. I. A., 340. | (8) 7 B. L. R., App., 114. |
| (2) 12 C. L. R., 479. | (9) I. L. R., 3 All., 770. |
| (3) I. L. R., 3 All., 175. | (10) I. L. R., 6 All., 344. |
| (4) 6 W. R. C. R., 116. | (11) I. L. R., 11 All., 164. |
| (5) 7 W. R. C. R., 428. | (12) I. L. R., 4 All., 291. |
| (6) N.-W. P. H. C. Rep., 1868, p. 358. | (13) I. L. R., 4 All., 414. |
| (7) N.-W. P. H. C. Rep., 1870, p. 284. | (14) I. L. R., 8 All., 54. |

* Reference in Second Appeal No. 749 of 1889.

1892
 ALI ABBAS
 v.
 KALKA
 PRASAD.

TYRRELL and KNOX, JJ.—This appeal has arisen out of a pre-emption suit brought by the appellant against the respondents. There are two appellants, the father and a minor son. At the time the suit was brought Syed Ali Abbas the father, was a recorded co-sharer in the mahál to which the contested property belongs. The second appellant, his minor son, Ghulam Haidar, who is joined with him in the suit, is said to have obtained the property now in controversy by gift from the other plaintiff *pendent lite*. The defendant, respondent, is the conditional vendee from a co-sharer of the plaintiff under a deed of conditional sale executed in favour of his (the defendant's) father, Khushhali, on the 12th of August 1872. Under the terms of that deed the respondent, or rather his father, was put in possession of the land, the subject of the conditional sale. On the 4th of August 1873, this vendee applied under Regulation XVII of 1806, s. 8, for a notice of foreclosure against his conditional vendor. On the 27th of August 1874, the year of grace contemplated by the above section expired, but the conditional vendee took no steps to obtain an order of foreclosure in the terms of the last paragraph of s. 8 of the Regulation until the 17th of February 1885, upon which date he moved the District Judge of Allahabad to give him an order in the terms of s. 8 of Regulation XVII of 1806. On the 9th of March, the District Judge of Allahabad having found that notice had been duly issued under the Regulation to the vendor, and that the year of grace had expired on the 27th of August 1874, without any payment by the vendor to the vendee, gave to the conditional vendee the foreclosure order he sought for. The conditional vendee, for reasons which are not disclosed, although he had possession of the property, brought a suit, apparently to mature and establish his title against his vendor, on the 26th of March 1885, that is to say, a few weeks, after he had obtained the foreclosure order, and on the 16th of May 1885, he obtained a decree. The appellant here claiming to pre-empt the property which was the subject-matter of the conditional sale, instituted the present suit on the 9th of September 1886. It is conceded on both sides that the limitation of art. 120 of sch. ii of Act No. XV of 1877 is applicable to this case.

The question therefore arises whether or not this suit has been brought within six years of the date when the right to bring the suit accrued. The suit is based on a provision in the *uājib-ul-arz* to the effect that "co-sharer's have a right to pre-empt in cases of sale by a co-sharer." When did the sale in question take place? Should it be deemed to have taken place on the 27th of August 1874, when the year of grace expired, or on the 9th of March 1885, when the District Judge gave a foreclosure order under s. 8 of Regulation XVII of 1806, or on the 16th of May of 1885, when the vendee's title was perfected by a final decree made in the suit in that behalf between himself and his vendor?

1892

ALI ABBAS
v.
KALKA
PRASAD.

Both the Courts below have defeated the pre-emptor upon the ground of limitation, holding that time ran against him from the 27th of August 1874. Mr. *Sundar Lal*, on behalf of the appellant, contends here that no complete, absolute or full title was vested in the conditional vendee in respect of the property in suit prior to the 16th of May 1885, when he obtained a decree in the controversial suit for declaration of his right as absolute vendee from the Civil Court. In support of his contention Mr. *Sundar Lal* relied upon the ruling of this Court in *Prag Chaubey v. Bhajan Chaudhri* (1), where it was held by the late Mr. Justice Oldfield that the *terminus a quo* for a suit of the character of the suit now before us is to be found in the date of the decree which declared the completeness and maturity of the title of the conditional vendee, and not from the date of the expiry of twelve months from the date of the notice issued by the District Court in its ministerial capacity under the Regulation, or from the date of the foreclosure order made by the District Judge. Mr. *Sundar Lal* also relied upon the ruling in *Udit Singh v. Fadarat Singh* (2), and we understand that he was in a position to refer to some few other authorities in the same direction. But as we intimated to him that we mean to refer the question in issue to a Full Bench, he preferred to reserve them for the present.

(1) 1. L. R., 4 All., 291.

(2) 1. L. R., 4 All., 54.

1892

ALI ABBAS

v.

KALEA
PRASAD.

In support of the respondent's case Mr. Ram Prasad cited the following authorities:—*Tawakkul Rai v. Lachmun Rai* (1); *Ashik Ali v. Mothura Kandu* (2); *Hazari Ram v. Shankar Dial* (3); *Buddree Doss v. Durga Pershad* (4); *Jeorakhun Singh v. Hookum Singh* (5); *Digombur Misser v. Ram Lal Roy* (6); *Moonshee Syud Ameer Ali v. Bhabo Soonduree Debia* (7); *Mohunt Ajoodhya Pooree v. Sohun Lal* (8); *Musammat Tara Kunwar v. Mangri Meea* (9).

Mr. Ram Prasad tells us explicitly that he relies upon the date of the 27th of August 1874 as the *terminus a quo* for this suit, and he contends that a suit for pre-emption brought more than six years after that date is barred by limitation. He does not rely upon the foreclosure order, and rightly in our opinion; for it is pretty obvious that although proceedings under s. 8 of Regulation XVII of 1806 had been set on foot in 1873, yet when the application was made in March 1885, and the foreclosure order was given in the same month by the District Judge under s. 8 of the said Regulation, the order was made without jurisdiction: for the Regulation in question had been repealed in its entirety by Act No. IV of 1882, and under the Full Bench ruling of this Court in *Ganga Sahai v. Kishen Sahai* (10) it was incompetent to the District Judge to use the procedure of the repealed Regulation. The only course open to the conditional vendee in those proceedings was to have adopted the procedure of the Transfer of Property Act, in order to obtain the relief he wanted; and we may observe that the suit which he brought in the year 1885 was not a suit which he could have brought under the Transfer of Property Act, nor was the decree given to him a decree which could properly be made in a suit brought under the Transfer of Property Act.

However that may be, the only question now before us is whether the limitation of art. 120 is to be calculated from the 27th of August 1874, when the year of grace expired, or from the date of the decree of the 16th of May 1885. There can be no doubt

(1) I. L. R., 6 All., 244.

(2) I. L. R., 5 All., 187.

(3) I. L. R., 3 All., 770.

(4) N.-W. P. H. C. Rep., 1870, p. 284.

(5) N.-W. P. H. C. Rep., 1868, p. 358.

(6) I. L. R., 14 Cal., 761.

(7) 6 W. R., C. B., 116.

(8) 7 W. R., C. B., 428.

(9) 7 B. L. R., App., 114.

(10) I. L. R., 6 All., 262.

that there has been considerable conflict of opinion upon this point between different Benches of this Court. It is well to mention here, so as to clear the ground, that there is no question in the present case of want of notice on the pre-emptor's part of the fact of the conditional sale of 1872, or of the fact that a notice for foreclosure had been applied for and obtained, or of the fact that the year of grace was about to expire. This is shown by the proceeding No. 19 upon the record of this suit, dated the 19th of August 1874, in which the pre-emptor intervened in the foreclosure proceeding and made certain objections which were disposed of by the District Judge. We think that it is desirable that a Full Bench should determine the question whether in respect of a pre-emption suit brought after the passing of Act No. IV of 1882 in respect of a co-sharer's transfer by way of conditional sale to a stranger of his rights in a mahál in 1872, and in respect of which foreclosure proceedings had been initiated under Regulation XVII of 1806 the *terminus a quo* under s. 120 is to be found in the date of the expiry of the year of grace in such proceedings, or in a decree in a suit brought between the conditional vendee and the conditional vendor to establish the former's absolute title to the subject-matter of the conditional sale.

1892
 ALI AHMED
 v
 KALKA
 PRASAD.

We refer this question accordingly.

On the case coming before the Full Bench the following judgments were pronounced.

The Hon'ble Mr. *Spankie* and Pandit *Sundur Lal*, for the appellants.

Munshi *Ram Prasad*, for the respondent.

EDGE, C.J.—The suit out of which this appeal and reference have arisen is one for pre-emption. On the 12th of August 1872 the then owner mortgaged his share by way of a mortgage by conditional sale. On the 27th of August 1873 a notice or *parwana* in accordance with s. 7 of Regulation XVII of 1806 was duly served. On the 27th of August 1874, the mortgage-moneys not having been satisfied, s. 8 of that Regulation applied. Nothing further appears to have been done till the 17th of February 1885,

1832
 ALI ABBAS
 v.
 KALKA
 BASAD.

when an application was made to the District Judge to draw up an order completing the foreclosure proceedings commenced in 1873. On the 9th of March 1885 the District Judge made what purported to be the order asked for. On the 26th of March 1885 the son of the vendee brought a suit to establish his title as vendee under the foreclosure proceedings and the conditional sale of 1872. That suit was contested by the mortgagor, but on the 16th of May 1885 the vendee obtained a decree declaring his title. On the 9th of September 1886 the suit for pre-emption now before us was brought. The question referred to us is whether, admitting art. 120 of sch. ii of the Indian Limitation Act to be applicable, the right of the pre-empting plaintiff to sue accrued on the expiration of the year of grace which expired on the 27th of August 1874, or when the vendee obtained his decree clearing his title on the 16th of May 1885. It has been contended by Mr. *Spankie* for the plaintiffs-appellants that no right of suit for pre-emption accrued before the 16th of May 1885, the contention being that according to the judgment of their Lordships of the Privy Council in *Forbes v. Ameeroonissa Begum* (1), there was in contemplation of law under the Regulation no complete sale until the conditional vendee had brought his suit for a declaration of his absolute title and until he has obtained a decree in his favour in that suit. Mr. *Spankie* in support of that contention has relied on the case of *Rais-ud-din Chowdhry v. Khodu Newaz Chowdhry* (2) in which, apparently, that Court held that without a suit for possession, or a suit for declaration of absolute title, a conditional vendee did not under the Regulation become an absolute vendee. The learned Judges in that case refer generally to the fact that such was the result of the decisions in that Court. I am unable to agree either with their conclusion, or with the proposition that the invariable decisions of the Court supported that view. Mr. *Spankie* also referred to *Jaikaran Rai v. Ganga Dhari Rai* (3), *Prag Chaubey v. Bhajan Chaudhri* (4), and to *Rasik Lal v. Gajraj Singh* (5), which apparently

(1) 10 Moo. I. A., 340, at pp. 350-1.

(3) I. L. R., 3 All., 175.

(2) 12 C. L. R., 479.

(4) I. L. R., 4 All., 291.

(5) I. L. R., 4 All., 414.

supported his contention. He also criticised certain other judgments of this Court. On the other hand, Mr. *Ram Prasad*, for the respondent vendee, or rather heir of the vendee, relied on *Moonshee Syud Ameer Ali Bhabo Soonduree Debia* (1), *Mohunt Ajoodhya Pooree v. Sohun Lal* (2), *Jeorakhun Singh v. Hookum Singh* (3), *Musammatt Tara Kunwar v. Mangri Meea* (4), *Hazari Ram v. Shankar Dial* (5), and *Tauakkul Rai v. Lachman Rai* (6). It appears to me that the principle of the decisions of those cases shows that on the expiration of the year of grace, provided that anything remains to be paid under the mortgage and the Proceedings under the Regulation were regular, all of which facts appear to have been found here, the title of the conditional vendee becomes that of an absolute vendee and the sale becomes an absolute sale on that date. In one of those cases, *viz.*, *Jeorakhun Singh v. Hookum Singh* (3) the decision of their Lordships of the Privy Council in *Furber v. Ameeroonissa* (7) is very fully considered, and it appears to me that the right interpretation was placed upon it. With regard to that case in the Privy Council it is to be observed that the decree which their Lordships gave to the conditional vendee was a decree that the appellant before them, who was conditional vendee, "was entitled to the possession of the mortgaged premises as absolute owner by virtue of the conditional sale, which had been duly made absolute, but was not entitled to a decree for any *mesne* profits." Apparently the reason why he was deprived of a decree for *mesne* profits was his own conduct. Our brother Mahmood and Mr. Justice Duthoit in *Tauakkul Rai v. Lachman Rai* (6) agreed with the view of the Judges in the case in the N.-W.P. High Court Reports, 1868, p. 358. I notice that in s. 7 of Regulation XVII of 1806, reference is made to the mortgage being fully foreclosed in the manner provided for in s. 8, and I also notice in the concluding portion of s. 8 that the *parwana* therein provided for is to notify to the mortgagor amongst other things, that in certain events "the mortgage will be fully foreclosed, and the conditional sale will become conclusive." The suit for a declaration of title may be

1892

ALI ABEEAS

KALKA
PRASAD.

(1) 6 W. c. B. R., 116.

(4) 6 B. L. R., App. 114.

(2) 7 W. c. B. R., 428.

(5) I. L. R., 3 All., 770.

(3) N.-W. P. H. C. Rep., 1868, p. 358. (6) I. L. R., 6 All., 344.

(7) 10 Moo. L. A., 340.

1892

ALI ABBAS

v.

KALKA

PRASAD.

necessary where the vendee wishes to clear his title by obtaining a decree of the Civil Court declaring his title to be that of an absolute vendee. Such a suit could not be maintained if he were not *de facto* and *de jure* the absolute vendee at the date when the suit was brought, therefore it appears to me that it cannot be said that his title as absolute vendee first came into existence when he obtained a decree in his declaratory suit. In my opinion limitation in this case began to run from the 27th of August 1874, when the year of grace expired under the circumstances of this case, and that is the answer which I would give.

STRAIGHT, J.—I am of the same opinion, I only wish further to add that having heard the fuller argument of this case and of the point referred, I am of opinion that the two rulings to which I was a party, one reported in I. L. R., 4 All., 414, and the other in I. L. R., 8 All., 54, were erroneous decisions and must no longer be regarded as binding.

TYRRELL, J.—My answer to the reference is that the right to sue in the present case accrued on and after the expiry of the years of grace on the 27th of August 1874.

MAHMOOD, J.—Consistently with my judgments in the cases of *Tauakku Rai v. Lachman Rai* (1) and *Ajaib Nath v. Mothura Prasad* (2), I am of the same opinion as the learned Chief Justice and my brothers Straight and Tyrrell.

KNOX, J.—I am of the same opinion as the learned Chief Justice and my brother Tyrrell, and would answer this reference in the same manner.

(1) I. L. R., 6 All., 344.

(2) I. L. R., 8 All., 164.

REVISIONAL CIVIL.

Before Mr. Justice Mahmood and Mr. Justice Knox.

MIHR ALI SHAH (PETITIONER) v. MUHAMMAD HUSEN AND OTHERS
(OPPOSITE PARTIES).*

1892
March 25.

Revision—Powers of High Court—Jurisdiction—Act IX of 1887 (Small Cause Courts Act), sch ii, cl. (18).

Unless the facts from which want of jurisdiction on the part of subordinate Court may be inferred are patent upon the face of the record, the High Court will not interfere in revision.

A suit by a Muhammadan to obtain a share in property distributable under the terms of a certain endowment is a suit of the nature contemplated by clause (18) of schedule ii of the Provincial Small Cause Courts Act (IX of 1887), and therefore not cognizable by a Court of Small Causes.

The facts of this case sufficiently appear from the judgment of Mahmood, J.

Pandit *Sundar Lal*, and Maulvi *Ghulam Mujiaba*, for the applicants.

Mr. *D. Banerji* for the opposite parties.

MAHMOOD, J.—This is an application under s. 622 of the Code of Civil Procedure invoking the aid of this Court as a Court of Revision to disturb the decrees of the Munsif of Agra and the Subordinate Judge of that district as the Appellate Court which disposed of the case in appeal.

The solitary ground upon which such interference is invoked is, that the Court of the Subordinate Judge and the Munsif at Agra had no jurisdiction to try this suit, which was exclusively cognizable by the Court of Small Causes at Agra. In arguing this matter much ability has been displayed on behalf of the appellant by Pandit *Sundar Lal* and Mr. *Ghulam Mujiaba*, and in resisting it we have to deal with the argument of Mr. *Dwarkanath Banerji*, who appears for the opposite party.

The facts out of which this dispute has arisen are very simple. It is admitted that to the tomb and shrine of Shah Vilayat Shah

* Application No. 28 of 1891 for revision, under s. 622 of the Civil Procedure Code, of decree of Babu Ganga Saran, Subordinate Judge of Agra, dated the 3rd April 1891, varying a decree of Maulvi Muhammad Shafi, Munsif of Agra, dated the 28th November 1890.

1892
 MIHR ALI
 SHAH
 v.
 MUHAMMAD
 HUSEN.

is attached certain property of which the profits have to be devoted to the *dargah*, and that such property is not only devoted to the expenses contingent upon the ritual of the Muhammadans in respect of such matters, but is also distributed among his descendants among whom the parties to this litigation are admitted to be. It is also admitted that in respect of such properties the plaintiff has no right of personal ownership, but that the right by which he collects the income of the property is in the capacity of *sajja'da-nashin*, or, to use the phrase employed by the lower Courts, as *mutawalli*, and, to use the English simple phrase, he would be called the trustee of the property.

It seems that the parties to this litigation are not on friendly terms, because this very suit shows that the share claimed by the plaintiffs, respondents, being the share to which they were entitled under the object of the *waqf*, though found to be due to them, has not been paid by the defendant *sajjada-nashin*. There is not one question pressed upon us showing that the concurrent findings of both the lower Courts are wrong upon the merits as to the amount due to the plaintiffs whom Mr. *Banerji* represents.

But it is argued that although the plaintiffs might have had such a right of claiming the money that they did claim in this suit, yet the suit was of a character not entertainable in an ordinary Court of Civil Judicature because of s. 16 of the Provincial Small Cause Courts Act (Act No. IX of 1887), and it is then argued that because the suit was not a suit of an ordinary civil character, therefore we should now set aside the decrees of both the Courts below, leaving it open to the plaintiffs, respondents, to bring any action in the Small Cause Court at Agra.

Now I have no doubt that the provisions of s. 16 of the Provincial Small Cause Courts Act (Act No. IX of 1887) require that suit cognizable by the Small Cause Courts should be entertainable by those Courts and those Courts alone, but I am also satisfied that the provisions of s. 11 of the Code of Civil Procedure (Act No. XIV of 1882) require that unless it is shown that a cause does not fall within the ordinary jurisdiction of a Civil Court, the cause being

as it is here admitted and conceded, a cause of a civil nature, the Court is not to decline jurisdiction, so that, if I understand these two clauses aright, the following question arises :—

Is there anything in the Provincial Small Cause Courts Act (Act No. IX of 1887) to have ousted the jurisdiction of the Munsif of Agra as a Court of first instance or of the Subordinate Judge of Agra as a Court of appeal by reason of there being a separate Small Cause Court ?

1892
MIHR ALI
SHAH
v.
MUHAMMAD
HUSEN.

In arguing this point to show that such was the case, Pandit *Sundar Lal* and Mr. *Ghulam Mujiaba*, on behalf of the petitioner, have relied upon two of my own judgments in *Jai Devi v. Mathura Das* (1) and in *Masum Ali v. Mohsin Ali* (2). The argument in regard to these rulings on behalf of the petitioner has been that the principle applies to this case also, and that, therefore, the ruling of the Bombay High Court in *Bibi Ladli Begam v. Bibi Raja Rabia* (3) requires us to set aside the decrees of the Courts below with the effect that matters would stand exactly as they did before the litigation ever was started, irrespective of what happened in the Courts below.

Now in the first place, there is much in the judgment of Markby, J., in the case of *Drobo Moyee Dabee v. Bipin Mundul* (4) which may have to be considered as to whether or not at this stage a plea such as that raised in this application is to be entertained ; because it must be remembered that the Act upon which that ruling proceeded was the one which preceded the present enactment and was *in pari materia*.

It is, however, not upon this ground that I wish to dispose of this case. The petitioner never raised the question of jurisdiction, either in the Court of first instance or in the lower appellate Court, and the mere fact of contending that there was a want of jurisdiction at a stage such as this, under s. 622 of the Code of Civil Procedure, is not sufficient to decide whether that Court had or had not jurisdiction. Therefore, there was no material and no findings

(1) Weekly Notes, 1888, p. 193.

(2) Weekly Notes, 1890, p. 201.

(3) I. L. R., 13 Bom., 650.

(4) 10 W. R., c. 2. 6.

1892

MIHR ALI
SHAH
v.
MUHAMMAD
HUSEN.

in the concurrent judgments of the lower Courts to enable the petitioner to sustain his plea that there was any want of jurisdiction in this case. The powers exercisable by this Court as a Court of revision have been the subject of consideration by me in numerous cases where I have held that, unless facts ousting jurisdiction are patent from the pleadings of the parties and the findings of the Court, this Court, as a Court of revision, should desist from interfering. Adopting the same views and applying them to this case, I do not think that there is any reason to interfere.

I wish, however, to mention as to clause (18) of the second Schedule of the Provincial Small Cause Courts Act (Act No. IX of 1887) excluding suits relating to a trust, that I regard this suit as presented by the pleadings of the parties in this cause to be a suit of that character, and that upon a former occasion also the same view was adopted by Stuart, C.J., and Turner, J., in Miscellaneous No. 33B of 1877. The case is, therefore, not shown to be a fit case for cognizance by the Small Cause Court, and therefore the Courts below had jurisdiction, and I would decline to interfere. I therefore reject this application with costs in all the Courts.

KNOX, J.—The pleadings in this case, in my opinion, show that it is one of those cases which by clause (18), sch. ii, attached to the Provincial Small Cause Courts Act (IX of 1887) was in distinct terms excluded from the cognizance of the Small Cause Court. The parties before us in a previous case, to which my brother Mahmood has alluded, contended over property of the same nature, and in that case it was determined by this Court that the case was not one for rent, but one relating to a trust, and therefore under the Act then in force (Act No. XI of 1865) a suit which Courts of Small Causes could not hear and determine. Bearing these facts in mind, and for similar reasons to those already given, I am of opinion that this case is one in which there is no cause for us to interfere, and I would concur in dismissing the application with costs in all Courts.

Application rejected.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

MAHABIR PRASAD AND OTHERS (PLAINTIFFS) v. PARMA

(DEFENDANT) *

1892
March 31.*Civil Procedure Code, ss. 13, 278, 331—Execution of decree—Res judicata.*

The plaintiff, having obtained a decree for possession of certain land, applied for execution by delivery of possession. Whereupon a third party filed an objection, in the Court of the Munsif, that he held a prior decree for possession of the same land, and therefore the plaintiff's decree was incapable of execution. This objection was allowed, and the plaintiff then sued for establishment of his right to possession of the land jointly with the objector, making the former judgment-debtor and the objector defendants to the suit. The Subordinate Judge in first appeal held that the Munsif had acted under s. 331 of the Code of Civil Procedure, and, applying s. 13 of the same Code, dismissed the plaintiff's suit. The plaintiff then appealed.—*Held* that circumstances did not exist to give the Munsif jurisdiction to act under s. 331, and that his order must be taken to have been made, as it purported to have been made, under s. 278. *Bukal Sing Chowdhry v. Behari Lal* (1) referred to.

The scope and application of s. 331 of the Code of Criminal Procedure commented upon.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellants.

Babu *Jogendro Nath Chaudhri*, for the respondent.

EDGE, C J., and TYRRELL, J.—This second appeal has arisen out of a suit in which the plaintiffs, who are appellants here, claimed a decree for the establishment of a joint right of the plaintiffs and the respondent here in certain land and for joint possession, and certain other matters. The facts, so far as they appear and are material to the consideration of this appeal, are as follows:—The plaintiffs had obtained a decree against one of the defendants to this suit (defendant No. 2) for possession of the land. After they had obtained that decree the defendant No. 1, respondent here, filed an objection in the Munsif's Court to the delivery of possession in execution, alleging that he held a prior decree for possession of

* Second appeal No. 9 of 1890 from a decree of Maulvi Muhammad Mazhar Husain Khan, Subordinate Judge of Gorakhpur, dated the 25th September 1889, reversing a decree of Pandit Alopi Prasad, Munsif of Basti, dated the 21st January 1888.

(1) I. B. L. R., A. C. 203.

1892
MAHABIR
PRASAD
v.
PARMA.

this land against defendant No. 2, and that he, and not the plaintiffs, was entitled to possession, and alleging further that he, defendant No. 1, held possession. The Munsif proceeded to deal with that objection, treating it as an objection under s. 278 of the Code of Civil Procedure. The fact that the Munsif considered that he was acting under s. 278 of the Code is apparent from the statement in his *rubkar* that the objection was made under s. 278. The Munsif allowed the objection with costs; thereupon the plaintiffs brought this suit. The first Court decreed the suit. The defendant No. 1 appealed, and the lower appellate Court dismissed the suit, holding that as against defendant No. 1 the suit was barred by s. 13 of the Code of Civil Procedure, and that as against defendant No. 2 the suit did not lie owing to s. 244 of the Code. We have nothing to do with the suit so far as it related to defendant No. 2. The Subordinate Judge's grounds for applying s. 13 of the Code of Civil Procedure were the objection and the order thereon which had been passed by the Munsif and the assumption by the Subordinate Judge that the proceedings on the objection were proceedings under s. 331 of the Code. It is difficult to understand how the Subordinate Judge came to that conclusion. On the face of the *rubkar* of the Munsif, as we have said, it was obvious that the Munsif dealt with the objection as if s. 278 were the section which applied. He did not adopt any of the procedure of s. 331 of the Code. There was no claim which he had numbered and registered as a suit between the decree-holder as plaintiff and the claimant as defendant. The facts did not exist which would have given him jurisdiction to proceed under s. 331. S. 331 begins thus:—"If the resistance or obstruction has been occasioned." In order to see what the resistance or obstruction referred to in s. 331 is, we must refer to the previous sections. Now s. 328 is the first of the group of sections relating to resistance to the execution of decree. The intermediate sections, ss. 329 and 330, do not apply to this case, as the resistance was neither on the part of the judgment-debtor nor of any person at his instigation. Consequently the resistance or obstruction mentioned in s. 331 must be the resistance or obstruction contemplated by s. 328. Now the resistance or obstruction contemplated by that

1892

MAHABIR

PRASAD

V.

PARMA.

section is the resistance to, or obstruction of, the officer charged with the execution of a warrant for the possession of property, and it is a resistance or an obstruction in the execution of a decree for the possession of property. Now, so far as appears, the officer charged with the execution of the warrant was not resisted or obstructed at all. Such obstruction as there was, was caused by the defendant No. 1 filing his objection in the Munsif's Court. Again, there was no claim to be numbered and registered as a suit within the meaning of s. 331. The word "claim" there has been rather unfortunately used, because at first sight one would think that "claim" and "claimant" had reference to each other; but the claimant in s. 331 is the person who makes or causes the resistance or obstruction, and it never could have been intended that an objection filed by him should be numbered and registered as a suit in which the decree-holder was to be made plaintiff; in other words, it never could have been intended that the decree-holder should be made plaintiff to support a claim put in by the person objecting to his proceedings in execution. The claim mentioned in s. 331 must mean the complaint which is mentioned in s. 328. That complaint is the complaint of the decree-holder, and not of the person causing the resistance or obstruction. There were, in fact, no elements in this case to give the Munsif jurisdiction to proceed or pass any order under s. 331. If, contrary to what we believe, the Subordinate Judge is right in thinking that the Munsif did proceed under s. 331, then all that need be said is that his proceedings were without jurisdiction and his order is nugatory. If, on the other hand, he proceeded, as he professed to proceed, under s. 278, he was proceeding under a section which relates to the attachment of property for the purposes of execution, and which does not relate, so far as we can see, to the execution of a decree for possession of immoveable property. In any case, the Munsif's order, if passed under s. 278, would not operate as a bar to this suit. The view which we take of s. 331 is similar to that taken as to the corresponding section of a former Code, by Jackson, J., in *Bahal Sing Chowdhry v. Behari Lal* (1). The Subordinate Judge has not tried this appeal on its merits; he has decided it on

(1) 1 B. L., A. C., 206.

1892 a preliminary point, and wrongly. We set aside his decree and remand the appeal under s. 562 of the Code of Civil Procedure to the Court of the Subordinate Judge to be reinstated on his file and disposed of according to law. Costs here and hitherto will abide the result.

MAHABIR
PRASAD
v.
PARMA.

Cause remanded.

PRIVY COUNCIL.

P. C. AMARNATH SAH AND OTHERS (PLAINTIFFS) v. ACHAN KUAR AND
1892 OTHERS (DEFENDANTS).
March 11
and
May 14.

On appeal from the High Court at Allahabad.

Hindu law—Hindu widow—Burden of proving necessity where a Hindu widow attempts to alienate property held by her for her widow's estate.

In order to sustain an alienation of the property held by a Hindu widow for her widow's estate, it must be shown either that there was legal necessity for the alienation, or at least that the grantee was led, on reasonable ground, to believe that there was.

In a suit upon a mortgage of such property executed under the authority of a widow borrowing money, the point whether the loan was necessary was expressed in the issues in the form of a question how far the defendants' objections, grounded on the absence of necessity, were tenable. This was obviously an incorrect mode of trying the suit, because it assumed that it was for the defendants to show absence of necessity, and did not accord with the obligation upon a mortgagee, claiming under a widow, to prove a valid mortgage. It was sufficient to defeat the suit that, upon the whole case, there had been no proof of the lender's having fulfilled the legal obligation to inquire and satisfy himself that the widow, from whom he was taking a charge upon her husband's inheritance, had a proper justification for so charging it. *Hunuman Persaud v. Munraj Koonweree* (1) referred to.

Appeal from a decree (11th August 1888) reversing a decree (27th May 1885) of the Subordinate Judge of Bareilly.

The suit out of which this appeal arose had among its objects the fixing a charge on thirteen villages, which had belonged to Khairati Lal, deceased in 1866, who traded in Bareilly, under the firm of Rattan Singh, Khairati Lal, and whose family continued his business after his death. His widow, Hulas Kuar, on the 4th of

Present : LORDS HOBHOUSE, MACNAGHTEN, and HANNEN, SIR R. COUCH and LORD SHAND.

(1) 6 Moo. I. A., 393.

April 1866 gave her general mukhtarnama to her son-in-law, Lalji (fourth of the present defendants, but who did not appear to defend) authorising him to manage the firm's business. Lalji was the husband of her daughter Achan Kuar, the first defendant, and their two sons, Enayet and Shamsher, were the second and third defendants. Hulas died in 1878, and both Lalji and Shamsher died before this appeal was filed.

1892
AMARNATH
SAH
v.
ACHAN
KUAR.

The plaintiffs, now appellants, were the heirs of Moti Ram Sah, formerly a shraf in Bareilly; and they brought the present suit on a bond and mortgage, dated the 23rd of March 1873, claiming the balance, after crediting payment of Rs. 7,000, upon a loan, originally Rs. 32,000, with interest amounting to Rs. 39,249, taken by Lalji, as mukhtar of Hulas, claiming also a charge on villages mortgaged. Achan, Enayet and Shamsher, by their written statements, set up the defence that Hulas had no power to bind them by borrowing, and no power to mortgage the property inherited from her husband except for necessary purposes and that no such purposes existed in this transaction. Achan denied that Lalji had power to bind her interest in her father's estate, or to consent on behalf of his sons to the mortgage.

The issues related to the questions raised by the defences, and, among others, to the alleged "absence of necessity" to take the loan.

It appeared that after the death of Hulas, her daughter Achan, with her two sons, Enayet Singh and Shamsher Singh, obtained entry of their names in the Revenue records in place of the deceased. Also that on the 5th of March 1877, a power in favour of Lalji was executed by Hulas, Achan and Enayet Singh, declaring that whatever proceeding had been, or might be, taken by the Mukhtar (Lalji) on their behalf, should be recognised by them as done by themselves.

In the result, the Subordinate Judge made a decree in favour of the plaintiffs for Rs. 38,010, and directed that, if this sum should not be paid, the mortgaged villages should be sold.

1892

AMARNATH
SAH
v.
ACHAN
KUAR.

Achan, Enayet Singh and Shamsher appealed to the High Court. By an order (16th February 1888), the plaintiffs, then respondents, were permitted to produce further evidence, and they filed accounts and other documents. They also examined a witness, Hira Lal, who stated the circumstances under which the loan of Rs. 32,000 was taken by Hulas.

The judgment of the Divisional Court (SIR J. EDGE, C.J., and TYRRELL, J.) dealt with the question of the necessity of the loan, and decided that the purposes for which, in fact, the Rs. 32,000 were borrowed from the firm of Moti Ram Sah, were not purposes that could be pronounced "necessary," according to Hindu Law. With regard to how far Achan was bound by the acknowledgment of authority contained in the document of the 5th of March 1877, the Judges decided that there was nothing to show that, at the date of the bond of 1873, Lalji had authority from his wife to bind her in that transaction as to her expectant life interest; and that it could only be by treating the words in the subsequent power, executed in 1877, as a ratification of Lalji's act, that it could be said that he was so authorised. But as to that document, they considered the terms to be vague, and not calculated to show that at the time of the execution Achan had her attention called to, or was aware of, all the circumstances attending the bond of 1873, or knew what her own position was. It was not binding upon her. As to Enayet Singh, they were not satisfied with the evidence on the record that he was of age in 1877. Looking at the whole case, they were of opinion that the plaintiffs had failed to make out a case against any of the three defendants, and in that view they reversed the decree of the Subordinate Judge, and dismissed the suit with costs.

On this appeal—

Mr. R. V. Doyne, and Mr. G. E. A. Ross, for the appellants, argued that the High Court should not have held that the purposes for which the loan was taken were not necessary. During the lifetime of Khairati Lal, the firm, of which was head, carried on dealings with Moti Ram Sah, which were continued after his death, with the knowledge of Hulas. In fact, her husband left debt

contracted in his lawful business. These, his widow, in paying, would be acting as a faithful widow. She was bound to pay these debts, and could not pay them by other means than by borrowing. For these, and other purposes, connected with the maintenance and credit of the family, which was committed to keeping up the firm, she was justified in mortgaging. These matters were known to the lender of the money, and the occasion was regarded as a justifying and necessary one. The object of the document of 1877 was to satisfy the customers of the firm that Lalji could deal with the family estate for business purposes.

1892
AMARNATH
SAH
v.
ACHAN
KUAR.

Reference was made to—

Hunooman Persaud v. Munraj Koorwerre (1), *the Collector of Muslipatam v. Caraly Vencata Narrainapah* (2), *Raj Lukhee Debea v. Gokool Chunder Chowdhry* (3), *Kameswar Pershad v. Run Bahadoor Singh* (4).

Mr. J. D. Mayne, for the respondents, argued that the judgment of the High Court was right. The mortgage of March 1873 only bound the widow's estate for her own life, and had ceased, upon her death, to operate. There had been no ratification.

Mr. R. V. Doyne replied.

Afterwards (14th May) their Lordships' judgment was delivered by LORD HOBHOUSE.

The plaintiffs, who are now appellants, brought a suit against the present respondents and two other defendants to enforce a mortgage bond executed to one Moti Ram, the ancestor of the plaintiffs, for the purpose of securing an advance of Rs. 32,000, with interest thereon.

The bond sued upon is dated the 23rd of March 1873, and it commences in this way :—

“I, Raja Lalji, for self, and as guardian of Kuar Enayet Singh and Kuar Shamsheer Bahadur, muktar of Rani Hulas, Kuar wife, and manager of Rani Achan Kuar, daughter of Raja Khairati Lal,

(1) 6 Moo. I. A., 393.

(3) 13 Moo. I. A. 209.

(2) 8 Moo. I. A., 500.

(4) L. R., 8 I. A., 8; I. L. R., 6 Cal., 243.

1892

AMARNATH
SAH
v.
ACHAN
KUAR.

caste Kayasth, resident of Lucknow, now residing at Bareilly, do declare that I have, under the power given to me by registered general power of attorney, dated the 4th of April 1866, executed by Rani Hulas Kuar under the power of the certificate of guardianship dated the 18th of July 1866, and under the power which I have to make management in general, borrowed Rs. 32,000 of the Company's coin, half of which is Rs. 16,000, for the payment of the debt taken to meet the marriage expenses of Kuar Enayet Singh and the expenses of the case pending at Lucknow from before."

Raja Lalji then agree to pay the money in five years, and hypothecates and pledges certain mauzas belonging to Rani Hulas Kuar.

Khairati Lal, who died in 1866, was the zamindar of the mauzas in question, and was also a dealer in money and in hundis Hulas was his widow and heir. Achan was his only child, and she married Raja Lalji. Enayet and Shamsher were the children of that marriage, both being minors at the date of the bond. Very shortly after Khairati's death, Hulas executed a mukhtarnama giving to Lalji very large powers of management and disposition over her property. She died on the 22nd of June 1878. Shamsher and Lalji were the two defendants below who are not now respondents. They are both dead.

The plaint, which was filed in February 1885, states that the four defendants borrowed the money, and that Hulas hypothecated the estate; and it prays such relief as is usual in the case of mortgage bonds. Lalji did not put in any written defence; indeed he cannot have had any defence. The other three defendants all set up the defence (among others) that Hulas had only a widow's estate, and was under no necessity to borrow money. The plaintiffs replied by a written statement in which they alleged that on the 5th of March 1877 another deed was executed by Hulas, Achan and Enayet to Lalji, by which they admitted and recognised the deed of the 23rd of March 1873. But the reply is quite silent, as was the plaint, upon the point whether the loan was necessary or not.

When the issues were settled, this point was treated as belonging to the defence, and was raised in the form of a question, how far the objections resting on the absence of necessity were tenable. It is obvious that such a mode of raising the question is incorrect, because it appears to assume that it was for the defendants to show absence of necessity ; whereas the rule is that a mortgagee claiming title under a Hindu widow as against her husband's heir should prove the validity of his mortgage ; and this case presents no ground of exception to the rule. Neither party adduced any evidence bearing on the point.

132
 AMARNATH
 SAK
 v.
 ACHAN
 KUMAR.

The Subordinate Judge gave the plaintiffs a decree for an amount something less than the amount claimed by them ; and ordered that the hypothecation should be enforced. He was of opinion that the plea of non-necessity was not made out, apparently on the ground of the recital in the mortgage bond ; and he also thought that the defendants Achan and Enayet had confirmed the bond.

The defendants other than Lalji appealed to the High Court. During the argument for the plaintiffs certain observations were made by their Counsel which induced the Court to make an order enabling them to produce further evidence. The order is not in the record, but probably it was framed so as to allow the plaintiffs to prove the necessity for the loan raised by Hulas. For that purpose the plaintiffs called as a witness one Hira Lal, who entered Khairati's service in the year 1864, and managed or assisted in managing the monetary business up to the year 1880. He was the only witness called. Lalji, who must have known the facts better than anybody else, died shortly before the hearing of the appeal.

After hearing the further evidence the High Court decided that there was no proof of any necessity for the loan, and that no act had been done by Achan or Enayet which had the effect of making them liable for it. They therefore dismissed the suit with costs. From this decree the plaintiffs appeal, and it has been strongly urged at the bar that they are entitled to succeed, both on the ground of the propriety and validity of the mortgage by Hulas, and

1892 on the ground that Achan and Enayet have validated it if originally invalid.

AMARNATH
JAH

ACHAN
KUAR.

As regards Enayet, he has never had any present interest in the estate. He is only heir-apparent now; and on the 5th of March 1877, the date of the deed relied on for the validation of the mortgage, he was not even so much as that; his mother, Achan, was then heir-apparent. It is not contended that he ever took upon himself any personal responsibility for the loan, and it is clear that he has never been in a position to confirm the mortgage.

As regards Achan, the expressions relied on in the deed are as follows:—After stating that the former power of attorney was given to Lalji by Hulas alone, the three parties, Hulas, Achan and Enayet, appoint Lalji their general attorney. They then proceed;—

“We covenant and record that whatever proceeding has been or may be taken by the said mukhtar on our behalf, *i.e.*, if he, having borrowed money, executes bonds or sells, pledges, mortgages or alienates in some other way the movable and immovable properties, or gives in lease the whole or a portion of the villages at any jama he thinks proper, or gets the documents executed by us registered, or causes mutation of names to be effected in respect of villages, &c., owing to temporary or permanent alienations, all such proceedings taken by the said mukhtar shall be accepted and recognised by us as done by ourselves, and not ignored by us in any way.”

The whole of these expressions except the three words “has been or” point to that which is the proper object of a power of attorney viz, to give authority to the future acts of the attorney. Achan was a *pardanashin* lady; she had no interest in the estate other than one in expectancy; she was not dealing with a stranger, but with her own husbands; she was not receiving any valuable consideration. It is true that she executed the deed after having it read over to her. But there is no evidence that she was told that amongst the somewhat profuse heap of words conferring ordinary powers on a general attorney, there lurked just three words having a far

different effect, the effect, namely, of subjecting her expectant estate to a burden which she was gratuitously undertaking. There is no evidence that at this time she knew anything about a prior mortgage. Indeed, it is not shown that she received any advice or information beyond having the deed read to her word for word. It would be against all principles if a lady so situated were held bound by such a transaction.

1892
 AMARNATH
 SAH
 v.
 ACHAN
 KUAB.

Reliance was placed by Mr. Doyne on two subsequent mortgages executed by Achan after the death of Hulas, in which Moti Ram's debt is mentioned. In one of them it is stated that Rs. 30,000 is borrowed for payment of the debt due to Moti Ram and others; and it is shown that shortly afterwards the sum of Rs. 7,000 was paid to Moti Ram. But it does not appear that those deeds were so much as read over to Achan, to say nothing of the want of explanation.

The foregoing views render it unnecessary for their Lordships to enter on the question when Enayet attained his majority, or on the question how far the transactions of Achan could be of avail for the plaintiffs who were not parties to them, both debated at the bar. Their Lordships are clear that nothing was done to give Moti Ram's security greater validity than it originally possessed.

That reduces the questions in the suit to one, viz., the validity of the mortgage by Hulas as against her successors. To prove its validity the plaintiffs must show either that there was legal necessity for raising the money by a charge on Khairati's estate, or at least that in advancing his money Moti Ram gave credit on reasonable grounds to representations that the money was wanted for such necessity. It has been above shown that the plaintiffs neither averred nor attempted to prove necessity until their case was being argued in the High Court. They laid their claim under Hulas as if she were the absolute owner. On the appeal they were treated with great indulgence, being allowed in effect to amend their case. One effect of Hira Lal's evidence is to show the untrustworthiness of the statements in the mortgage bond on which the Subordinate Judge relied to show that Moti Ram's advance was applied to

1892

AMARNATH
SAH
v.
ACHAN
KHAR.

defray the marriage expenses of Enayet and the costs of the Lucknow suit. Out of the Rs. 32,000 advanced nearly Rs. 26,000 were applied in paying off hundis, Rs. 12,400 being due to Moti Ram himself. We are told nothing of the amount of Enayet's expenses; nothing of any reason why they should be paid by his grandmother instead of his father; nothing of the nature of the Lucknow suit except that it was for ancestral property; nothing to show that in March 1873 any costs at all had been incurred by Hulas. So that the statements in the bond receive on effectual support and much contradiction from the new evidence.

But the plaintiffs rely on an entirely new cause of necessity, viz, that Khairati's money business, which had been carried on by Hulas under the management of Lalji, was in a critical state, and that it was necessary to borrow money in order to ward off total insolvency. On this point their Lordships agree with the High Court in thinking the effect of Hira Lal's evidence to be that at Khairati's death the business was solvent on paper, but that there were bad debts the losses on which were never recovered, though the business struggled on for a good many years. The view of the High Court is that the widow ought to have wound up the business at once, and that not having done so, she could not allege necessity to mortgage the inheritance in order to keep the money business going. But they do not lay down any general rule for such cases, and they feel the difficulty of a decision in the entire absence of authority. Their Lordships also feel great difficulty, and they would require to know much more about the nature of the business in question, and of the condition and fluctuations of this particular business before venturing to endorse the opinion of the High Court.

Their Lordships prefer to rest this part of the case on the entire failure of the plaintiffs to discharge the burden of proof which lies upon them. It has been above stated, in accordance with the often-cited case of *Hunooman Persaud v. Munraj Koonwere* (1) that, in order to sustain an alienation by a Hindu widow

(1) 6 Moo. I. A., 393.

of the *corpus* of her husband's estate, it must be shown either that there was legal necessity for the alienation, or at least that the grantee was led on reasonable grounds to believe that there was. But the plaintiffs have not proved either actual necessity, even that Moti Ram believed that there was such necessity, or that he ever made any inquiry on the subject. He may have rested content with the vague and misleading statements in the deed. He may have considered, as the plaintiffs have considered in this litigation, that the question of necessity did not concern him. He may have thought, as they apparently have thought, that he was taking title under an absolute owner. Anyhow, the plaintiffs have not performed their legal obligation of proving that their ancestor performed his legal obligation, which was to inquire and satisfy himself that the widow from whom he was taking a charge upon her husband's inheritance had a proper justification for so charging it. That is sufficient to defeat the suit. Their Lordships will humbly advise Her Majesty to dismiss the appeal, and the appellants must pay the costs.

1892

AMARNATH
SAR
v.
ACHAN
KUR.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Lattey and Hart.*

Solicitors for the respondents: Messrs. *Pyke and Parrott.*

FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Mahmood and
Mr. Justice Knox.*

AGHA ALI KHAN AND ANOTHER (PLAINTIFFS) v. ALTAF HASAN
KHAN AND ANOTHER (DEFENDANTS).*

1892

May 9.

Muhammadan Law—Shia sect—Waqf.

According to the law applicable to the *Shia* sect of Muhammadans a *waqf-bil-wasiyat*, or testamentary *waqf*, is not valid unless actual delivery of possession of the appropriated property is made by the *waqif* (or appropriator) himself to the *mutawalli* (or superintendent appointed by the *waqif*).

*First Appeal No. 85 of 1888 (connected with F.A. No. 94 of 1888) from a decree of Munshi Kulwant Prasad, Subordinate Judge of Cawnpur.

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

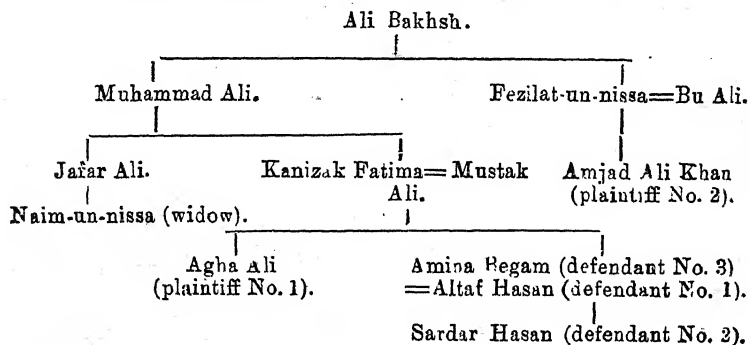
According to the same law the death of the *waqif* before actual delivery of possession of the appropriated property by him to the *mutawalli* or the beneficiaries of the trust renders the *waqf* null and void *ab initio*.

Consequently, where the *waqif* dies, as mentioned above, before actual delivery of possession of the appropriated property, the consent of his heirs to the testamentary *waqf* cannot validate such *waqf*.

Distinction between *waqf-bil-wasiyat* and *wasiyat-bil waqf* explained.

THIS was a reference to the Full Bench made at the instance of Mahmood and Young, JJ. The facts of the case out of which the reference arose are very fully stated in the order of reference made by Mahmood, J., which is as follows:—

MAHMOOD, J.—The parties to this litigation are *Shias*, and their relative position appears from the following pedigree:—



Muhammad Ali, whose name appears in the pedigree, was a Muhammadan of the *Shia* sect, and owned considerable estate, including the properties which form the subject-matter of this suit, viz:—

- (1) Mauza Rampur.
- (2) „ Narkhas.
- (3) „ Pipri Piterhar.
- (4) „ Hafizpur.
- (5) 2 pacca houses known as Anarwala, in Lucknow.

On the 3rd of November 1863, he executed a deed which purported to set apart the above-mentioned four villages and two houses, the properties in suit, as *waqf* to be administered by the *Mustahid-ul-asr*, Muhammad Taqi, and his descendants, &c., for certain

religious and charitable objects specified in the deed. The deed purports to be a formal document and is a lengthy one, and it is a question in this case whether it is to be regarded as a will or as a *waqf-nama*, that is, a deed of endowment.

On the 14th of November 1863, Muhammad Ali executed another deed purporting to make a gift of a village, Chandpur, to make provision for Musammat Naim-un-nissa, widow of his deceased son Jafar Ali.

Similarly, on the 23rd November 1863, he executed another deed in which, after reciting the provision he had made under the earlier two deeds, he purported to convey by gift the rest of his estate to his daughter Musammat Kanizak Fatime.

Again, on the 27th of November 1863, he executed another document in which he in brief terms recapitulated and confirmed the provisions of the three earlier deeds.

Muhammad Ali died on the 11th of December 1863, leaving Musammat Kanizak Fatima as his only heir under the *Shia* law of inheritance. It is also not disputed that at his death she obtained possession of the properties now in dispute, but on this point there is a question between the parties whether such possession was as absolute proprietor or as *mutawalli* of the *waqf*, which the deed of the 3rd of November 1863 purported to create, and the deed of the 27th of November 1863 to confirm. It is, however, admitted that in the Government Revenue Records mutation of names took place in her favour in respect of the four villages in suit, and her name was entered as proprietor instead of her deceased father Muhammad Ali.

Matters stood thus, when on the 7th of November 1864 the *Mujahid-ul-asr*, Muhammad Taqi, whom Muhammad Ali's deed of the 3rd of November 1863 purported to appoint as *mutawalli* of the *waqf* property (namely, the four village and two houses in dispute) instituted a suit for possession of the aforesaid property, basing his claim upon his right as *mutawalli* under Muhammad Ali's deed of the 3rd of November 1863. The suit was instituted against Musammat Kanizak Fatima, and she defended it by a

1893

AGHA ALI
KHAN
v.ALTAF
HASAN
KHAN.

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

written statement dated the 24th July 1865, in which she stated *inter alia* that her father had never given effect to the *waqf* by delivery of possession to the proposed *mutawalli*; that it had therefore become *null* and *void*; that, notwithstanding this circumstance, the aforesaid Muhammad Taqi had been asked to accept the trust upon the conditions prescribed by the deceased Muhammad Ali, but had definitely refused to accept the terms of the trust, and was therefore no longer entitled to claim the possession of the *waqf* property. This plea appears to have been allowed by the District Judge (Mr. B. Sapta), who decided the suit, dismissing it on the 20th of January 1866.

Referring order, printed by the Court.

The suit of Muhammad Taqi having thus been defeated, Musammat Kanizak Fatima appears to have continued in undisturbed possession of her father's estate, including the villages and houses now in dispute. Then followed certain transactions which may be mentioned here.

On the 14th of October 1881, Musammat Kanizak Fatima executed a will of which the scope and objects are best represented in the opening sentence, which runs as follows :—

“Whereas God in His mercy has blessed this helpless being (the testatrix) with children and property, and among my children there are a son and a daughter, and life is uncertain, and there is a disagreement between these two heirs of mine, therefore it is incumbent on me to make whatever arrangements it may be advisable to make during my life-time, so that after my death there may be no dispute between my heirs ; therefore whatever arrangements it is advisable to carry out, and those matters which it is necessary to state are set forth in paragraphs below, and I desire to express my intention and wishes, whatever these are, in this paper, and my heirs must not act contrary to them, and in the event of their acting contrary thereto, the Presiding Officer of the time will carry out and enforce my will.”

The first paragraph of the will makes disposition of certain movable properties and is unimportant for the purposes of this suit.

The second paragraph, however, requires consideration. It enumerates the properties of which the testatrix was then in possession, and it draws a distinction between the four villages and the two houses which had been made *wagf* by her father's will of the 3rd of November 1863, and other properties of which she was in possession as absolute owner. This distinction appears in the first half of the paragraph, and in the latter half the testatrix deals with the rest of her property which is not included in this suit. The effect of this part of the will is to make a gift of a four-anna share in the various properties to her son-in-law Altaf Hasan Khan (defendant No. 1), and another four-anna share to her daughter Musammat Amina Begam (defendant No. 3), and it goes on to say that the gift in favour of these two persons had already been completed by separate deeds and delivery of possession. The last part of the paragraph expresses an intention on her part to make a gift of the remaining eight-anna share in the properties, and after enumerating them goes on to say:—"Whenever my son Agha Ali Khan wishes it, a deed of gift will also be executed and completed in his favour. This property, belonging to me, the testatrix, will not be considered as struck out (*kharij*) from my property until the execution of the deed of gift, and it will continue to be my property."

1892
 AGHA ALI
 KHAN
 v.
 ALTAF
 HASAN
 KHAN.

The statement of these facts, however, is only introductory to what will hereafter be stated as to the transactions between Mrs. Sammat Kanizak Fatima and her son Agha Ali (plaintiff No. 1) having a bearing upon his right to maintain this suit. What is of great importance as relating immediately to the property now in suit (namely the property declared as *wagf* by Muhammad Ali's deeds of the 3rd of November 1863 and the 27th of November 1863) is the fourth paragraph of Kanizak Fatima's will now under consideration. A considerable portion of the paragraph requires quotation, as indicating the manner in which the property now in suit was dealt with by the testatrix. It runs as follows:—

"In addition to the property belonging to me, the testatrix, a detail of which is given above, there are *Mauzas Rampur, Batrana, Narkhas, Pathri Patharhar* and *Hafizpur*, pargana *Rasulabad*,

1892

AGHA ALI
KHAN

v.

ALTAF
HASAN
KHAN.

zila Cawnpur, and two houses known as Anarwala situated in *mohalla Banjaritola*, one of the *mohallas* of Lucknow, a detail of which is given above. This property was left by the will of my father Sheikh Muhammad Ali, deceased, which was separated for charitable purposes, as *waqf*. In regard to these, neither I, the testatrix, have any proprietary powers of enjoyment and transfer, nor will my heirs have any. In accordance with the intention of my deceased father, as well as judgment of the Court, I, the testatrix, have been held to be the executrix, and superintendent (*walli*) of that property, and my duty is this, that I will continue to apply the profits of that property in such acts of charity as my deceased father's will provides, and I, the testatrix, up to the time of the execution of this document have been applying the profits of the villages which have been willed as aforesaid in actual acts of charity. I do not save anything from it. During my life-time I will continue to act up to the intentions of the will as executrix and superintendent (*tauliat*) to the best of my ability, and after my death, Musammam Amina Begam *alias* Aghai Jan, my daughter, and Agha Ali Khan, my son, will be held to be the *mutawalli* (trustee to an endowment) and executors of a moiety each in the event of both acting in harmony among themselves, and in the event of there being a disagreement both my son and daughter will continue to carry out the intentions of the will separately in the proportion of a moiety each, and my representative will always continue to act in accordance with the terms of the will of my deceased father as well as in accordance with the *rules of practice* written by me, the testatrix, and bearing my seal, which I will execute separately, and whatever I, the testatrix, will write out the said heirs will be bound by it, and it will be incumbent on them to continue to apply the profits of the property which has been willed for the purposes intended by the will in accordance with the above writing and to keep a correct account of the same as the officers and *mujtahidin* will have power to look into them. These powers as *tauliat* (trustee of an endowment) and executors which both my son and daughter have, will after them, be transferred in the same way to their offspring from

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

generation to generation (*naslan bād naslan*) whether both have issue, or out of both of them whoever may have issue, and so long as there is a descendant of mine in existence, my heirs and the presiding officer of the time will not have power to appoint any person an executor. And be it known that as I have no confidence in my son's abilities and his proper management, and from motherly love and affection I consider my son and daughter to be equal, and to the best of my knowledge and belief the matters connected with the intentions of the will will be carried out in a better manner on behalf of my daughter through her husband and children than by my son. Therefore I have appointed both these heirs *mutawallies* and executors in equal shares. If the disagreement between these two heirs can in no way be removed, then the presiding officer of the time will have the intentions of the will carried out through *mujtahdins* (doctors of religion) and learned men. Out of these two heirs, one person only will, on no account, be the *mutawalli* and executor. And be it also known that my father did not bequeath more than $\frac{1}{3}$ rd by will, and I got the remainder of the property by right of inheritance, and a will under Muhammadan law (*shara*) can operate to the extent of $\frac{1}{3}$ rd only, hence the property that remained separate from the will and which devolved on me, the testatrix, by inheritance, the will of my deceased father does not effect it in any way, nor did I admit his will in regard to this property : hence my proprietary enjoyment of the property in question is in every way proper and valid."

This will does not seem to have given satisfaction to Agha Ali (plaintiff No. 1) as is shown by what followed :—On the 1st of November 1881, two deeds were executed by way of settlement of difference between the mother and son.

One of these two documents is an *ikrarnāma* executed by Agha Ali Khan (plaintiff No. 1) of which the opening part may be quoted here, as it recites the objects and motives with which the deed was executed. It runs thus :—

"I, Agha Ali Khan, son of Hakim Mustak Ali Khan, deceased, resident of Banjaritola, one of the *mohallas* in the city of Lucknow

1892

AGHA ALI
KHAN

v.

AITAF
HASAN
KHAN.

do hereby declare that amity and unity would established the family, while disunion and disagreement would ruin it ; that the opinions expressed by the prudent ancestor are conducive to the benefit and welfare of the family ; that the dutiful children should be prevented from that ; that therefore at the present time the respected farsighted mother, in respect of the disposal of the property owned by her, desired that it be so arranged that on her demise there should not arise any quarrel or dispute between myself and my real sister Musammat Amina Begam, *alias* Aghai Jan, the only heirs to her (the mother) ; that for us, the heirs, it would be beneficial to abide in every way by the will executed by her, containing the necessary particulars and proper directions ; that moreover, with a view of avoiding future disputes, she, out of the property owned by her, transferred a large portion of the property to the two heirs during her life-time under registered deeds of gift : that the completion and maintenance of that arrangement made by the said mother had thus been agreed upon that both of us should remain bound by the directions given by her ; that we shall accept all the directions given in the will and the deeds of gift ; that without this the benefit and advantage contemplated by her to follow from such an arrangement in respect of each of her heirs cannot accrue as she desired ; that I, the executant, in every way came to find it expedient and conducive to my advantage that the establishment and completion of that arrangement should come to pass by means of writings respectively made by each of us, the heirs ; that, with an eye to my advantage, I, the executant, of my own accord, while in a sound state of body and mind, without any force or coercion, swear by God and the Prophet that I have in sincerity and good faith bound myself to those terms that shall be detailed hereafter ; that now and in future I, the executant, or the representatives of me, the executant, shall have no power to deviate from the conditions laid down in this document ; that should on behalf of me, the executant, or on behalf of my heirs and representatives, anything be set forth contrary to the terms and stipulations entered in this document, it shall be void and shall not be entertaining.

This preliminary part is followed by the various clauses into which the *ikrarnama* is divided. The first clause, referring to Musammat Kanizak Fatima's will of the 14th of October 1881, runs as follows:—

“That the contents of the registered will and the deeds of gift executed by my respected mother in favour of my sister Amina Begam, *alias* Aghai Jan, and in favour of my brother Sheikh Altaf Hasan Khan, are approved and accepted by me word for word, that neither have I now nor shall have in future any objection in regard to any matter.”

The next three clauses are unimportant for the purposes of this litigation, but the fifth clause refers directly to the property now in suit. It runs thus:—

“I shall continue to perform all acts and matters directed by the will in respect of the property endowed and willed by Sheikh Muhammad Ali Khan, deceased, after my mother's death, jointly with my sister, and under the management (*sarbarakari*) of her husband, and on her death jointly with her issue; that I shall not through selfish motives interrupt or disturb the arrangement; that in no case whatever I shall have the power to object to the *mutawalliship* of my sister or to that of her issue on her death; that in no case I shall put forth my exclusive claim for discharge the duties appertaining to that *mutawalliship*, and if I do so, it shall not be entertainable in a Court of justice.”

Another clause of the *ikrarnama* is the eighth, which refers to the intended *dastur-ul-amal*, which was subsequently incorporated in Musammat Kanizak Fatima's deed of the 22nd of October 1884, which she executed as a supplement to her will of the 14th of October 1881. The clause runs as follows:—

“That I agree that I shall always follow all the directions which may be found in the *dastur-ul-amal* in respect of the villages willed, the intention of writing of which is expressed in the will by the mother, jointly with my sister and under the management of her husband, and on her death, jointly with her issue.”

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

The other document executed on the same day as Agha Ali's *ikrarnama* of the 1st of November 1881 is a deed of gift by Musammat Kanizak Fatima in favour of her son, the aforesaid Agha Ali Khan (plaintiff No. 1). The deed after referring to the disposition of property made by her in the will of the 14th of October 1881 goes on to say :—

“I had reserved half of the villages owned by me and certain houses detailed below to be given in gift to my son, *Nurchasem* Agha Ali Khan. Now as the said *Nurchasem*, having approved of the said will, has agreed that a deed of gift in respect of the eight-anna share should, as is stated in the aforesaid will, be executed in his favour completed with registration, I, having executed this document on an adequate stamp, do declare that I have of my own free will and accord and while in a sound state of body and mind made without any external pressure and coercion a gift to my son *Nurchasem* Agha Ali Khan, who is also my heir, through maternal affection, of an eight-anna share in *mauzas*.”

Matters seem to have rested thus for nearly three years, during which period Musammat Kanizak Fatima appears to have remained in possession of the property now in suit, that is, the *wagf* property, to which the fourth paragraph of her will of the 14th of October 1881 related.

What followed is represented by two documents executed by Musammat Kanizak Fatima on the 22nd of October 1884. One of these is a codicil to her will of the 14th of October 1881, to which it refers in the opening sentence. The document has been described as *dastur-ul-amal* or rules of practice and guidance for the administration of the *wagf* property mentioned in the fourth paragraph of her will, dated the 14th of October 1881, from which the above quotation has been made.

The other document executed by Musammat Kanizak Fatima on the same day (22nd of October 1884) is a lease of the four *wagf* villages in favour of her daughter's son Sardar Husain defendant No. 2) for a term of 25 years, on terms which are stated by

the plaintiff to be unduly favourable to the lessee, and to contravene the terms of the *waqf* as described in Muhammad Ali's deed of the 3rd of November 1863.

1892
AGHA ALI
KHAN
v.
ALTAH
HASAN
KHAN.

These two deeds were duly executed and registered, but they do not seem to have given satisfaction to Agha Ali Khan (plaintiff No. 1), and may be said to be the main reason for the institution of this suit.

This is indicated by what followed.

Agha Ali Khan instituted a suit against his mother Musammat Kanizak Fatima, his sister Musammat Amina Begam and her husband Sheikh Altaf Hasan Khan, for cancelling his *ikrarnama* of the 1st of November 1881, on the allegation that it had been obtained by fraud and undue influence, and was otherwise illegal. This litigation is referred to in the Subordinate Judge's judgment in this case, and forms the subject of Second Appeal No. 1144 of 1887, which is still pending in this Court awaiting the decision of this case.

Musammat Kanizak Fatima died on the 17th of November 1886, and on the 5th of March 1887 the present suit was instituted by Agha Ali Khan (plaintiff No. 1) jointly with his cousin Amjad Ali Khan (plaintiff No. 2), whose name appears in the genealogical table set forth at the outset of this judgment. The defendants to the suit are Altaf Hasan Khan, Sardar Husain and Amina Begam.

The claim as set forth in the plaint proceeds upon the contention that Muhammad Ali's deed of the 3rd of November 1863 created a valid *waqf* under the *Shia* law; that it took immediate effect in the life-time of the executant, who continued to hold possession up to his death as *mutawalli* of the *waqf* property; that upon his death, on the 11th of December 1863, his daughter Musammat Kanizak Fatima took possession of the *waqf* property in the capacity of *mutawalli* or superintendent, and up to the time of her death, on the 17th of November 1886, she continued to apply the profits of the property to the charitable purposes

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

mentioned in her father's will of the 3rd of November 1863, and that her powers with respect to the *wagf* property must be regarded as subject to the restrictions and limits prescribed for the *mutawalli* in Muhammad Ali's will of the 3rd of November 1863, and the general rules of the *Shia* law on the subject. It is further alleged in the plaint that Musammat Kanizak Fatima exceeded her powers in dealing with *wagf* property by her will of the 14th of October 1881, and the codicil thereto, dated the 22nd of October 1884, as well as by executing the lease of the *wagf* villages dated the 22nd of October 1884, and these documents are therefore null and void being opposed to the terms of Muhammad Ali's will of the 3rd of November 1863, and the provisions of the Muhammadan Law. The plaintiffs further asserted that both under Muhammad Ali's will and the rules of the Muhammadan law they were entitled to the *mutawalliship* of the *wagf* property jointly or severally, and upon this ground they prayed for the following reliefs as stated in the plaint :—

(1) "That the plaintiffs may be appointed jointly, or severally, as the Court may think proper, superintendents of the endowed property, by cancelment of a lease and by actual ejectment of the defendants.

(2) That the will and the lease executed by Musammat Kanizak Fatima may be declared to be null and void.

(3) That such other relief as under the circumstances of the case may seem proper to the Court may be granted to the plaintiffs.

(4) That the costs of the suit may be awarded against all the defendants."

The suit was resisted by all the three defendants jointly by two written statements, one dated the 7th of May 1887, and the other dated the 21st of May 1887, the latter being apparently the amended written statement. The pleas in defence raised in these written statements are numerous enough to form the subject of no less than sixteen issues framed by the Lower Court, but it is unnecessary to repeat them here, for all of them have not been pressed in

the argument addressed to us on behalf of the parties in this Court, and those which have been pressed will be dealt with later on.

For the present it is enough to say that the Lower Court, after deciding the various issues raised by the pleadings of the parties, indicated its decree in the last part of the judgment in the following words:—

“For the reasons recorded in disposing of the 12 and the 14th issues, the whole of the claim of Amjad Ali Khan is to be dismissed. The claim of Agha Ali Khan for cancelment of the document executed by Kanizak Fatima is so far decreed as the said documents relate to the grant of the lease to Sardar Husain Khan, and so far as possession is given to him as lessee, and Altaf Hasan Khan is invested with the power of management and superintendence over the endowed property with an allowance of Rs. 300 per annum, out of the *wagf* property under the name of expenses of conveyance. But the claim for exclusive possession as superintendent by removal of Amina Begam is dismissed, and it is directed that the lessees' possession be removed, and Agha Ali Khan, plaintiff, and Amina Begam remain in possession as superintendents. Should it be shown in future that either of these persons has acted contrary to the conditions laid down by Sheikh Muhammad Ali, the Court shall pass suitable orders in respect of superintendentship. Having regard to peculiar features of this case, each party will pay half the costs with interest thereon at the rate of 8 annas per cent. per mensem. Amjad Ali Khan will get no costs. As the pleaders on both sides have greatly exerted themselves, and for several days argued the questions of law, they are entitled to a larger fee, Rs. 300 each, from their clients.”

From this decree two appeals have been presented to this Court. One is this appeal filed by the two plaintiffs, Agha Ali Khan (plaintiff No. 1), and Amjad Ali Khan (plaintiff No. 2). The other is a cross appeal from the same decree, and has been preferred jointly by all the three defendants, Altaf Hasan Khan (defendant No. 1), Sardar Husain (defendant No. 2), the Musammat Amina Begam (defendant No. 3). That appeal stands upon the

1892

AGHA ALI
KHANP.
ALTAF
HASAN
KHAN.

1892
 AGHA ALI
 KHAN
 v.
 ALTAF
 HASAN
 KHAN.

register of this Court as First Appeal No. 94 of 1888, to which both of the plaintiffs, viz., Agha Ali Khan and Amjad Ali Khan, were made respondent. Notices, however, could not be served upon the second respondent, Amjad Ali Khan, and when the appeal came on for hearing before my brother Young and myself on the 6th of June 1890, we were asked by Mr. *Conlan*, the learned counsel for the appellant, to hear the appeal without notice being served on Amjad Ali Khan, who, the learned counsel stated, was not a necessary party to the appeal, and the appellants did not therefore desire to prosecute the appeal against him. We accordingly decided to hear the appeal, as mentioned in our order of the 6th of June 1890.

The two connected appeals have thus been heard together, and the arguments on behalf of the plaintiffs have been heard in this case (First Appeal No. 85 of 1888), whilst the defendadt's contention has been presented in the argument on their behalf in their appeal (First Appeal No. 94 of 1888) referred to above. It may be stated here that in neither of these appeals did the respondents in their turn instruct counsel, probably because they were represented in the cases as appellants, alternately in the two cases, and the argument in support of one appeal would amount to argument on behalf of the respondents in the other appeal. I have stated this matter as affecting the question of costs, which may be awarded in this litigation.

The arguments thus addressed to us on behalf of the parties to the suit in both appeals place the entire litigation before us for decision, that is to say, the entire decree of the Lower Court is subjected to our adjudication in the two appeals.

The first four grounds of appeal on behalf of the defendants-appellants in First Appeal No. 94 of 1888 repeat certain preliminary pleas which were taken in the Lower Court and were disallowed by that Court in its finding upon the 13th, 14th, and 15th issues. Of those pleas the only one on which Mr. *Conlan* for the defendants insisted in his argument relates to the effect of section 539 of the Civil Procedure Code (Act No. XIV of 1882) upon

the right of the plaintiffs to institute the suit without having obtained the sanction of the Local Government. Upon this point I am of opinion that the section referred to has no application to suits such as the present in which the plaintiffs claim a right vested in them personally by reason of their being related to Muhammad Ali, and under the terms of his will of the 3rd of November 1863. They are not suing on behalf of the public, but in their own individual right, which is independent of the interests of the public at large, and is therefore not in need of the consent either of the public or the Local Government. I have recently had occasion to consider this question and to the views which I then expressed I still adhere, and hold that this suit is not affected by anything contained in section 539 of the Civil Procedure Code.

1892
AGHA ALI
KHAN
2,
ALTAF
HASAN
KHAN.

The other preliminary pleas relating to misjoinder, limitation, and the effect of section 43 of the Civil Procedure Code as barring the suit have not been pressed here, and it is enough to say that I agree with the Lower Court in the reasons for disallowing those pleas. Nor did Mr. Conlan in arguing the case for the defendants-appellants in First Appeal No. 94 of 1888 press the fifth ground of appeal, which is to the effect that "because the document of the 3rd of November 1863 is not a will, but a *waqf-nāma* or deed of endowment, and not being executed on a duly stamped paper is not admissible in evidence." The plea was the subject of the sixth issue in the Lower Court, and was disallowed by the Subordinate Judge for reasons in which I concur. The deed itself is before us, and it opens with the following words:—

"I, Sheikh Muhammad Ali, son of Sheikh Ali Bakhsh, resident of Lucknow, while in the enjoyment of sound health and senses, write these lines *by way of a will*, the execution of the provisions whereof shall rest with my executor *after my death*—that the under-mentioned four villages, &c."

These words in themselves leave no doubt that the instrument was intended by the executant to be a testamentary disposition of the property to which it relates. It was registered as a will by Mr. Frederick Lincoln, the Sadar Registrar of Lucknow, on the

1892

AGHA ALI
KHANv.
ALTAF
HASAN
KHAN.

7th of November 1863, and it has ever since been dealt with as a will by Musammat Kanizak Fatima, the only heir of the testator, Muhammad Ali. For instance, in paragraph 4 of her own will of the 14th of October 1881, she uniformly refers to her father's deed of the 3rd of November 1863, as "the will of my father, Sheikh Muhammad Ali, deceased," and the provisions of the deed itself show that it was intended to be a testamentary instrument. I have no doubt therefore that the Subordinate Judge was right in holding that the instrument did not require stamp, and that it was admissible in evidence.

Freed from these minor points, the contention between the parties, so far as it has been urged here, raises the following substantial questions for determination:—

(1).—Is a *waqf-bil-wasiyat* or testamentary *waqf* valid under the Muhammadan law of the *Shia* school in the absence of actual delivery by the *waqif* himself of possession of the appropriated property to the *mutawalli* or the person appointed as superintendent thereof by the deed whereby the *waqf* is created?

(2).—Does the death of a *waqif* (appropriator) before actual delivery of possession by him to the *mutawalli* or the beneficiaries of the trust invalidate the *waqf* so as to render it *null* and *void ab initio* under the *Shia* law?

(3).—If so, does the consent of the appropriator's heirs to testamentary *waqf* validate such *waqf* under that law?

(4).—Did the deeds of the 3rd of November 1863 and the 27th of November 1863, executed by Muhammad Ali, create a valid *waqf* under the *Shia* law? and was actual effect given to them by Muhammad Ali himself during his lifetime, and after his death by his daughter and only heir, Musammat Kanizak Fatima?

(5).—Upon the death of Muhammad Ali on the 11th of December 1863 did Musammat Kanizak Fatima obtain possession of the property now in suit by right of inheritance as the sole heir of her father or as successor to him as *mutawalli* of the *waqf* property?

(6).—Does Musammat Kanizak Fatima's will of the 4th of October 1881 amount to a fresh *waqf* of the property in suit of which she appointed herself the *mutawalli* for life, and after her death, her son and daughter, Agha Ali Khan and Musammat Amina Begam? and if so, was she entitled to alter the provisions of her father's will of the 3rd of November 1863?

1892
AGHA ALI
KHAN
v.
ALTAF
HUSAIN
KHAN.

(7).—What is the effect of the *ikrarnama* executed by Agha Ali Khan (plaintiff No. 1) upon his right to contest the validity of his mother's will of the 14th of October 1881, so far as the property now in suit is concerned?

(8).—Was the codicil of the 22nd of October 1884, executed by Musammat Kanizak Fatima as supplement to her will of the 15th October 1881, valid, and within her legal powers?

(9).—Was the lease of the 22nd of October 1884, executed by Musammat Kanizak Fatima in favour of her grandson, Sardar Husain, in respect of the villages in suit valid?

(10).—Are the plaintiffs, or either of them, entitled to oust the defendant, Sardar Husain, from possession under the lease of the 22nd of October 1884, or to exclude Musammat Amina Begam from her position as *mutawalli* of the *waqf* property now in suit under Musammat Kanizak Fatima's will of the 14th of October 1881?

(11).—Is there any such misfeasance or incompetency proved against Musammat Amina Begam as would entitle Agha Ali Khan (plaintiff No. 1) to exclude her from the joint *mutawalliship* of the *waqf* property now in dispute?

In my opinion the first of these questions is by far the most important as regulating the decision of this case. The second and third questions are closely connected with the first and require consideration before it becomes necessary to decide the remaining questions in the case as above formulated.

Upon the first three questions authorities have been cited on either side, but the terms in which these authorities on the *Shia* law express the rule are so much in discord with the doctrines of

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

the *Sunni* school of the Muhammdan law that I think that the question above referred to should be considered by a Full Bench of this Court. I may say that on behalf of one side of the question Pandit *Sundar Lal* has cited passages from Mr. Justice Ameer Ali's work on Muhammadan law, being the Tagore law lecture to the year 1884. On the other side of the question are passages to be found in the original Arabic works of high authority in the *Shia* law which do not seem to support the argument for the plaintiff so as to leave it undoubted whether or not a testamentary *waqf* is allowed under the *Shia* law. I will therefore refer the first three questions to the Full Bench with recommendation that the case should be laid before the learned Chief Justice for orders on the opening Court.

On the reference being heard by the Full Bench the following judgments were delivered :—

Munshi *Ram Prasad*, Pandit *Sundar Lal*, and Babu *Durga Charan*, for the appellants.

Mr. *Karamat Husain*, for the respondents.

MAHMOOD, J.—The preliminary facts from which the questions of law now under consideration have arisen have been stated by me in my order of reference dated the 1st of October 1890, in which Mr. Justice Young concurred. I need not therefore repeat those facts, and I think it is enough to say that the points referred to the Full Bench are the following :—

- (1) Is a *waqf-bil-wasiyat* or testamentary *waqf* valid under the Muhammadan law of the *Shia* school in the absence of actual delivery by the *waqif* himself of possession of the appropriated property to the *mutawalli* or the person appointed as superintendent thereof by the deed where-by the *waqf* is created ?
- (2) Does the death of a *waqif* (appropriator) before actual delivery of possession by him to the *mutawalli* or the beneficiaries of the trust invalidate the *waqf* so as to render it null and void *ab initio* under the *Shia* law ?

- (3) If so, does the consent of the appropriator's heirs to testamentary *waqf* validate such *waqf* under that law?

1892

AGHA ALI
KHAN
c.
ALTAF
HASAN
KHAN.

In considering the first of these questions it will be convenient to ascertain in the first place the exact nature and constitution of *waqf* as understood in the *Shia* law. The *Sharā'iy-ul-Islam* thus describes a *waqf* :

“ *Wukf* is a contract the fruit of effect or which is to tie up the original of a thing and to leave its usufruct free. The only express word by which it can be constituted is ‘ *Wukuf* ’ (I have appropriated), for with regard to ‘ *Hurrunto* ’ (I have consecrated), and ‘ *Suddukio* ’ (I have bestowed), they are not sufficient to constitute *wukf* without accompanying circumstances, as by themselves they are susceptible of another interpretation besides *wukf*.” (Baillie's *Imameea Law*, p. 211.)*

The most important point to be noticed in this definition is the word *contract* which Mr. Baillie in his translation, and I, after having consulted the original Arabic, agree in thinking is a correct equivalent of the word *aqd* (عقد), which in the Latin phraseology of English law might be rendered by the word *pactum*. The importance of this explanation lies in the circumstance that the incidents of *waqf* under the *Shia* law are vastly different from those of the *Sunni* law on some of the most radical points, and since such distinction will enable me to make my meaning more clear I will quote a passage from the *Fatawa Alamgiri*, accepting the translation of Mr. Baillie which I have compared with the original :—

“According to the two disciples *wukf* is the detention of a thing in the implied ownership of Almighty God, in such a manner that its profits may revert to or be applied for the benefit of mankind ; and the appropriation is obligatory, so that the thing appropriated can neither be sold, nor given, nor inherited. In the *Ayoon* and

* الوقف عقد ذمته تحييس الأصل وإطلاق المنفعة واللفظ المصريح فيه وقف لا غير اما حرمت و تصدقت فلا يحتمل علي الوقف الامع التريته الاحتماله مع الانفراد غير الوقف — (شرائع الاسلام كتاب الوقف مطبوعه كلكته صفحه ٢٣٤) *

1892

AGHA ALI
KHANv.
ALTAF
HASAN
KHAN.

Yutuma it is stated that the *futwa* is in conformity with the opinion of the two disciples." (Baillie's Hanifesa Law, p. 558).*

It will be observed that whilst under the *Shia* law *waqf* is a contract, under the *Sunni* law it is a unilateral disposition of property, and as such not subject to the rules of contract. This is shown from the following passage in the *Fatawa Alamgiri*, the substance of which has been correctly rendered by Mr. Baillie in the following words :—

"The pillars of *wukf* are special words declaratory of the appropriation, such as 'I have given this my land,' or 'bequeathed it as an appropriated and special *sudukuh* or charity.' Its cause or motive is a seeking for nearness.' And its legal effect according to the two disciples, 'and abatement of the appropriator's right of property in the thing appropriated in favour of Almighty God,' and, according to Aboo Huneefa, 'a detaining of it in the ownership of the appropriator, but without the power of alienation.' and 'a bestowing of its produce in charity.'" (Baillie's Hanifesa Law, p. 559.) †

It is a general rule of interpretation of the *Sunni* law that when there is a difference of opinion between Imám Abu Hanifa and his two disciples, Qazi Abu Yusuf and Imam Muhammad, the opinion of the majority prevails, and the passage from the *Fatawa Alamgiri* which I have first cited shows that in regard to the nature

* و عند هما حبس العين على حكم ملك الله تعالى على وجه يعود منقذ إلى العباد فيلزم ولا يباع ولا يوهب ولا يورث كذا في الهداية وفي العين و اليتمية ان الفتوى على قولهما — (عالمگیری جلد ثاني مطبوعه كلكته كتاب الوقف صفحه ٣٥٥) *

† فاما ركنه فلا لفاظ الخاصة بالدالة عليه كذا في البحار الرافق و اساسه فطلب الزلفى كذا في العناية و اما حكمه فعند هما زوال العين من ملكه إلى الله تعالى و مند ابى حنيفه رح حكمه صير ركة العين محبوسة على ملكه بحيث لا يقبل النقل من ملك إلى ملك والصدق بالغلة للمعدومة متى صح الوقف بان قال جعلت ارضى هذه صدقة موقوفة مؤبدة ارا وصيت به بعد موتي — (فتاوى عالمگیری جلد ثاني كتاب الوقف مطبوعه كلكته صفحه ٣٥٥ و ٣٥٦) *

effect and constitution of *waqf*, the opinion of the two disciples is the one which has been adopted and prevails.

Now, the distinction which thus exists between the *Sunni* and *Shia* law must not be lost sight of, as some of the texts and cases cited in the course of the argument proceeded upon the *Sunni* law and not upon the *Shia* law. Perhaps the most notable of these cases is *Wasiq Ali Khan v. The Government* (1) which, though a case relating to a *Shia waqf*, namely, the celebrated endowment under the will of Haji Muhammad Mohsin for the *Imámbara* at Hooghly, was dealt with by the Sadr Diwani Adálat upon the principles of the *Sunni* school of Muhammadan law which was then prevalent as the Muhammadan law administered by the Courts of British India. The case was decided so long ago as the 22nd of September 1836, and I seriously doubt whether in those days the *Shia* law was ever administered by the Courts of British India as the rule of decision, even when *Shias* were concerned. Mr. Baillie at the outset of the introduction to his *Imámeea Law* describes the history of the manner in which the *Shia* law came to be recognised in India, and I think I may safely say that it was not till the ruling of their Lordships of the Privy Council in *Rája Deedar Hossein v. Raneé Zahoor-oon-Nissa* (2), decided in 1841, that the enforceability of the *Shia* law by the British Courts in India was placed upon a firm footing. In that case their Lordships in dealing with an enactment *in pari materia* with s. 37 of our present Civil Courts Act (Act No. XII of 1887) went on to say (*vide* p. 478):—

“It is true that the *Socnee* law has generally prevailed, because the great Majority of the Indian Muhammadans are *Socnees*, there being very few families of the *Sheeah* sect, except those of the reigning princes, which will account for the prevalence of the *Socnee* doctrines in the Courts, but there is no practice which excludes the application of the *Sheeah* law to the rights of persons professing the tenets of that sect. The natural and equitable construction of the Regulation therefore must prevail.”

(1) 6 S. D. A. L. P., 110.

(2) 2 Moo. I. A., 441, *vide* pp. 577-8.

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

It was indeed in view of this ruling of the Lords of the Privy Council that in *Abbas Ali v. Maya Ram* (1), which was a pre-emption case, Mr. Justice Straight agreed with me in applying the strict *Shia* law, though my opinion required dissenting from two previous Division Bench rulings of this Court referred to in my judgment.

I have been anxious to place this preliminary point upon a footing which is conducive to preventing my judgment from being misunderstood, because, whilst on the one hand, if the questions which are before the Full Bench were questions of the *Sunni* (*Hanafi*) law, they would probably involve neither doubt nor difficulty; on the other hand, being questions governed by the *Shia* law, they are far from being simple questions, and in this judgment I will deal with them strictly according to the *Shia* doctrine as enunciated in the authoritative law works of that sect.

Now I have already said that the *Sharāyi-ul-Islam*, which is the most authoritative text-book of the *Shia* law, deals with *wagf* as a contract (*aqd عقد*), and I now proceed to show that the result of this doctrine as it has been accepted by authoritative commentators and writers on the *Shia* law has been to create complications of detail as to its constitution and incidents which require consideration in this case. The *Masālik-Afhām*, a celebrated and authoritative commentary on the *Sharāyi-ul-Islam*, as also the *Jawāhir-ul-Kalām*, another authoritative commentary on same text-book, throughout deals with *wagf* as a contract *inter partes* as distinguished from unilateral dispositions of property.

Perhaps the best way to indicate this is to quote and refer to the *Jāmi-ul-Shattāt*, in which three important points relevant to the present discussion are stated in the form of a question which runs as follows:—

“*Question.*—Is the formal expression (*siha*) necessary in appropriation? Is it a contract requiring offer and acceptance, or a

mere declaration ? and is the intention of a desire to draw near to God essential.* ”

The points raised in the above question when analysed are three, and they may be stated in the interrogative form to be the following :—

- (1) In the use of formal technical expressions necessary for creation of *waqf* ?
- (2) Is *waqf* a form of contract (*aqd*, عقد, *pactum*,) needing offer and acceptance, or a declaration (*iqd'a* 'إيقاع' unilateral disposition of property) ?
- (3) Is the intention of a desire to draw near to God essential ?

All these three points have been discussed at length in the *Jāmi-ul-Shattāt* in the chapter on *waqf* at pp. 332 and 333 of the Tehran edition ; but since the work is in print and available to the public, it would be unnecessarily lengthening my judgment if I were to quote a whole page of a folio to show the meaning which I take from that work. I content myself by saying that upon each one of the three points above-mentioned the final answers given by the text are the following, and these I state *seriatim* :—

Upon the *first* point in the question thus enunciated the answer is thus worded :—

“Yes, the use of formal technical expression is an essential condition, and without it *waqf* is not established.”†

Upon the *second* point the answer is thus worded :—

“*Waqf* is a contract needing offer and acceptance.”‡ But whilst thus generally expressing the necessity of the contractual

1892
AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

* در وقف صیغه شرط است یا نه و از باب عقودست که محتاجست
بایجاب و قبول یا ایقاعست و قصد قربت شرطست یا نه — (جاءع/لشقات
کتابالوقف صفحه ۳۳۲) *

† بلی صیغه شرطست و بدون آن منعقد نمی شود *

‡ وقف عقدیست محتاج بایجاب و قبول *

1892

AGHA ALI
KHAN

v.

ALTAF
HASAN
KHAN.

formalities of offer and acceptance, the text goes on to explain how in some cases exceptions are to be made, and in dealing with these exceptions the author, meeting the difficulty which arises out of the word *iqā'a*, ايقاع, which in English means 'declaration,' or rather 'unilateral disposition of property,' goes on to explain that—

"The meaning of *aqd*, عقد contract, here covers declarations (*iqā'a*, ايقاع unilateral dispositions)."

But in thus extending the ordinary technical legal meaning of the word *aqd*, عقد (which means contract needing offer and acceptance, the learned author is anxious to explain that the extended meaning applies only to certain classes of *waqf*, and, after dealing with the various opinions upon the subject, arrives at the conclusion that *acceptance* may be dispensed with in cases where such acceptance is impossible, such *waqf* being for public charities, such as a mosque or maintenance of *fugirs*, that is to say, the general pauper public.

This is the general substance of the answer given to the second point above enunciated according to the *Jāmi-ul-Shattāt*.

As to the *third* point, namely, whether the intention of a desire to draw near to God is essential, the *Jāmi-ul-Shattāt*, after stating differences of opinion goes on to say :—

"The accepted opinion is rendering it (i.e., intention of a desire to draw near to God) a condition; by reason of the absence of validity and uncertainty of the *waqf* without such intention and desire."

This then is the effect of the doctrine in the *Jāmi-ul-Shattāt*. That same doctrine is better and more tersely explained in the *Durūs*, a work of higher authority than the *Jāmi-ul-Shattāt* in regard to the same matter. The necessity of the use of formal technical expressions for creating a *waqf* being accepted on all

* که مراد از عقد درون جا مام از ايقاع است *

† و اظهار استلزام است بدلیل اصل عدم محکمیت و عدم تحقق وقف بدرون آن *

hands, the author of the *Durûs* deals with the other two points, and I will quote from him presently.

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

As to the necessity of the intention or desire to create a *waqf* he lays down a rule of common sense conformable to the rules of law and equity as understood not only in England but also in this country and in Muhammadan jurisprudence in general. After stating that the *wâqif* or the appropriator should not be under any legal disability and thus competent to enter into a legal contract, the author goes on to state as the second condition of the validity of a *waqf* that—"It is necessary that there should exist an intention, and therefore it cannot be established by one who is unconscious or asleep or drunk."*

Then, in dealing with the question of *acceptance* of a *waqf* the authority is equally clear upon what has been described by me already as to the second point in the question raised in the *Jâmi-ul-Shattât*, namely, whether *waqf* being a contract needs offer and acceptance as the essential conditions of its validity under the *Shia* law.

Upon this point the *Durûs* is perfectly, clear, all the more so as it is fully consistent with the *Shia* doctrine of regarding *waqf* as a contract (*aqd* ; عقد) as contra-distinguished from the *Sunni* doctrine upon the same subject. The author of the *Durûs*, recognising the necessity of keeping pace with the requirements of contracts and feeling the necessity of finding that in some cases of *waqf* whilst there is an offer there is no possibility of acceptance, and at the same time desirous of maintaining the *waqf* under such circumstances, goes on to explain the doctrine in the following words as the fourth condition governing such alienations :—

"The fourth condition is acceptance, which is *correlative* to offer when it is possible for those in whose favour the *waqf* has been made. Acceptance is not rendered necessary in the case of mendicants nor

* و ثانیہا الذیۃ فلا یقع من الغافل والنائم والسكران — (دروس)

کتاب الوقف) *

1892

AGHA ALI
KHAN
v.
ALLAH
HASAN
KHAN.

in the case of public charities because of the impossibility of securing acceptance.”*

It must therefore be taken that the *Shia* law recognises *waqf* not as a unilateral disposition of property, as it is recognised in the *Sunni* law, but as a contract which, according to the requirements of juristic notions, irrespective of either of these two systems must be a transaction *inter vivos*, and this *ex necessitate rei*.

I will refrain from expatiating upon this point of jurisprudence because, having once laid down, as I have already said, that a *waqf* under the *Shia* law is regarded as a contract (*aqd* عقد) requiring, at least in its general form, offer and acceptance, the rules which follow from such a doctrine must be interpreted conformably with such a notion.

This leads me to the latter part of the first question as referred to the Full Bench, which, indeed, is the turning point of this case—namely, whether actual delivery by the *wāqif* himself of the appropriated property to the *mutawalli*, or the person appointed as superintendent thereof, is essential to the validity of the *waqf* itself.

Upon this point, which, as I have already said, is the turning point of the case, much depends. The first point to ascertain is whether under the *Shia* law of the transfer of property known as *waqf* there is any distinction between transfers of property which require *tanjiz*, تنجيز, and those which do not require *tanjiz*, تنجيز, that is, immediate operation of the transaction *absolute* and *unconditional*.

The *Sharayi-ul-Islam* in describing the rule as to *waqf* goes on to say:—

“Conditions that relate to the *wukf* itself, which are four in number:—First, it must be perpetual; second, *absolute* and *unconditional*; third, possession must be given of the *mowkoof*, or thing appropriated; and, fourth, it must be entirely taken out of the

* رابعها القبول المقارن بالإيجاب إذا كان على من يمكن منه القبول ولا يشترط القبول في الوقف على الفقراء لعدم إمكان القبول ولا على الجهات العامة

كالمساجد — (دروس كتاب الوقف) *

wákif or appropriator himself. So that if the appropriation is restricted to a particular time or made dependent on some quality of future occurrence, it is void." (Baillie's Imameea Law, p. 218.)*

So far as the question of *tanjiz*, تَنْجِيز (which I have already interpreted) is concerned, the *Jawáhir-ul-Kalám* is more explicit. It says:—

"Similarly you have heard more than once that *tanjiz*, or to make a contract to take effect immediately, is necessary in every cause of legal results, save those which have been excepted (by the authority of law), and that appropriation is void if suspended on an uncertain or even certain future event. There is no difficulty or difference of opinion (on the necessity of *tanjiz*).” (*Jawáhir-ul-Kalám Book of Appropriation*. Tehran edition.)†

From this text it is clear that *waqf* being dealt with by the author as a contract, he lays down that *tanjiz*, تَنْجِيز is an essential condition of the validity of a *waqf*. The matter is even more fully explained in another work of high authority in the *Shia* law, namely, the *Jámi-ul-Maqásid*, which runs as follows in regard to *waqf*:—

"Its conditions are *tanjiz*, تَنْجِيز perpetuity, delivery of possession, and its exclusion from the ownership of the *waqf*, appropriator, himself, and an intention of nearness (to God). In regard to *waqf*, other matters are also conditioned; one of them is *tanjiz*, تَنْجِيز and therefore if he has suspended it upon any condition or quality like his saying 'when Zaid arrives I have certainly

* القسم الرابع في شرائط الوقف وهي اربعة الدوام والتنجيز والقباض و
اخرجه عن نفسه فلو قرنه بمدة بطل وكذا لو علقه بصفة متوقعة — (شرائع
الاسلام صفحة ٢٣٦) *

† وكذا قد سمعت غير مرة اعتبار التنجيز في نيل سبب شرعي
الا ما خرج د (انه يبطل لو علق) شيئاً (لصفة متوقعة) الحصول فيما ياتي
بل ارميقة بلا خلاف ولا اشكال — (جوامع الكلم شرح شرائع الاسلام كتاب الوقف
صفحة طبع طهران) *

1892

AGHA ALI
KHAN
D
ALTAF
HASAN
KHAN.

1892

AGHA ALI
KHAN
V.
ALTAJ
HASAN
KHAN.

appropriated my house,' or 'when the beginning of the month arrives, I have made a *waqf* of my slave,' it is invalid by reason of the absence of absolute certainty of it, in the same manner as in the case of sale and gift rendering them contingent invalidates them."*

To these texts I may add another, which shows how strictly the *Shia* law regards *waqf* as a contract and renders *tanjiz*, تنجيز an essential condition for its validity. The *Sharah Lamah Damishkia*, a work of high authority, has the following:—

"Besides above-mentioned matters, *tanjiz*, تنجيز is one of its (*waqfs*) conditions. Therefore, if he has suspended it upon any contingency or quality it is void, except in cases when the contingency already exists and the *waqif* (appropriator) is aware of its existence, such as his saying 'I have made this *waqf* if to-day is Friday, such as is the rule in regard to other contracts.'†

Now it is clear from these texts that the doctrine of *tanjiz*, تنجيز which is unanimously approved by the highest authorities of the *Shia* law, requires as one of the essential conditions precedent to the validity of a *waqf* that it should not be rendered contingent upon any future event, whether such event is likely or possible to occur, or even where it is certain to occur, such as the beginning of the next month or the occurrence of the death of the *waqif* i.e., the appropriator.

I now proceed to explain how this doctrine practically operates, imposing, as it does, the stringency which I have described. The

* ويشترط تنجيزه ودوامه واقباضه واخراجه من نفسه ونية القرب
يشترط في الوقف ايضا ان يمر آخري احدهما تنجيزه فلو ملق بشرط او صفة
مك ان يقول اذا جاء زيد فقد وقفت داري واذا جاء راس الشهر وقفت مديني
لم يصح لعدم التجزم كما لا يصح تعاقب البيع والهبة — (جامع المقاصد شرح
قواعد كتاب الوقف) *

† وشروطه مضافا إلى ما سلف التنجيز فلو ملقه ملي شرط او صفة بطل
إلا ان يكون واقعا والواقف مالمّا بوقوعه كقرله وقفت لان كان اليوم الجمعة و
كذا غيره من العقود — (شرح امعة دمشقية كتاب الوقف) *

best illustration of the application of the rule is the question of delivery of actual possession by the *wāqif* himself of the appropriated property to the *mutawalli* or the person appointed as superintendent of the *wāqf* property.

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

Upon this point I again take the text of the *Sharā'iy-ul-Islām* and its two recognised commentaries of the highest authority. The text of the *Sharā'iy-ul-Islām* and the explanation thereof in the *Masālik-ul-Afhām* are thus worded :—

“A *wāqf* does not become obligatory except by delivery of possession.” (Sharā'ī, p. 234, Calcutta edition.)*

“The author says,—‘A *wāqf* does not become obligatory except by delivery of possession. ‘There is no difference of opinion among our masters in the matter of seisin being a condition for the validity of a *wāqf*. So it does not become a contract without seisin in the same manner as it does not become a contract by a proposal without acceptance or *vice versa*. ‘Thus seisin forms a part of the cause by which the transfer of ownership is effected. This does not appear from the wording of the author as it negatives obligation. But he will soon, hereafter, state expressly what we have mentioned where he says in the 4th section that seisin is a condition for the validity of a *wāqf*. The use of this principle appears in the case of accession, if any, between the contract and seisin, for it (accession) is for the *wāqif* as we have shown. It is obvious that the fact of seisin being a condition for obligation is not inconsistent with the accession being for the benefit of the *maukuf-alaih* (beneficiary); the reason being that the *wāqf* is constituted though it is not binding; for regarding the ownership of accession obligation has no importance, so much so that the contract effecting the transfer is constituted, though such contract is optional in the opinion of the author and other doctors, as the principles of optional sale and the like tend to show. It may be perhaps that by negating the obligatory character of a *wāqf* in the absence of seisin, the author meant to contradict some of the *common people* (*Sunnīs*) who hold that

* لا يلزم إلا باقباض — (مراجع مرفوعة ٢٣ مطبوعة كلكة) *

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

a *waqf* becomes obligatory merely by using the word, though possession may not have been obtained ; and therefore the author has used such words as contradict that person expressly, without having regard to the inference to be drawn from the signification thereof and then after that he has expressed what he meant." (*Masālik-ul-Ashām*).*

More explicit on the subject of delivery of possession as a condition precedent to the validity of a *waqf* under the *Shai* law is the commentary of the *Sharā'iy-ul-Islām*, the *Jawāhir-ul-Kalām*, which dealing with the text, runs as follows:—

"So a contract of *waqf* does not become obligatory except by delivery of possession, which means seisin by permission ; therefore it is competent for either of the two (the *waqif* or the *maukuf-alaih*) to put an end to it before seisin. This is however not inconsistent with seisin being one of the conditions for validity used in the sense of the production of the effect or the fact of the *maukuf-alaih* becoming the owner of profits, &c., as explained hereafter by the author and others: nay, the learned even have deduced therefrom that a *waqf* becomes void by the death of the *waqif* before seisin and other principles. The necessity (of saying that a *waqf* contract does not become obligatory except by delivery of possession) is the

* قوله ولا يلزم بلا بالانقباض لا خلاى بين اصحابنا في اي القبض شرطاً لصحة الوقف فلا ينعقد بدونه كما لا ينعقد بالايجاب بمجرد من القبول او بالعكس فيكون القبض جزءاً من سبب الناقل للملك ومباراة المصنف ينفى لزوم فلا يفيد ذلك ولكنه فيما سيأتى سيصرح بما ذكرناه حيث يقول في القسم الرابع والقبض شرطاً في صحته ويظهر الفائدة في النماء المتخلل بين العقد والقبض على تقدير حصوله فانه الموقوف على ما حققناه وعلى ظاهر كونه شرطاً نفي اللزوم لا ينافي ان يكون الموقوف عليه التحقق الوقف وان لم يلزم فان اللزوم غير معتبر في ملك النماء حيث يتحقق العقد الناقل وان كان جائزاً عند المصنف وغيره من المحققين (كما نبه عليه في البيع بخيار ونحوه) ولعله حارل بنفي لزومه بدون القبض الرد على بعض العامة حيث جعله لازماً بمجرد الصيغة وان لم يقبضة فاتي بعبارة تدل عليه بالصرح ولم يعتبر دلالة مفهومها ثم صرح بمراعاة بعد ذلك —

(مسالك الافهام)

object to state here either that before seisin it is not, as some common people (*Sunnis*) say it is, obligatory, or that it does not follow from the happening of the contract that delivery of possession which is one of the conditions of validity is compulsory: though this (that delivery of possession is compulsory) has been imagined in consequence of the resemblance of the subject (*waqf*) by reading together the words of God, the Most High, 'fulfil (your promises)' and the argument which shows the importance of possession for validity which means the constitution of ownership and the like. The reason (for the view that 'it does not follow * * * is compulsory') is that although the words of God negative the originality of exemption, &c., yet they are not in conformity with the argument which almost evidently shows the importance of possession: nay, Azir* even evidently shows that cancellation before obtaining a possession is lawful, and that the *waqif* does not (thereby) commit a sin. 'I asked,' says Safwán in his book called *the Sahih*, 'about a person who made a *waqf* of an estate, and in whose mind it entered afterwards to make some alteration in the *waqf*.' Thereupon Abul Hasan said, 'if the person made a *waqf* of the estate in favor of his children and others, and appointed a manager of the estate, it is not open for him to revoke: if they (the *maukuf alaihim*) are minors and having stipulated the superintendence thereof on their behalf till their attaining majority, manages the estate on their behalf, it is not open for him to revoke the transaction. If they are of age and he did not deliver the estate to them, while they did not litigate for taking the management thereof from him, then it is open for him to revoke the transaction: because, notwithstanding their being of age, they do not take the management thereof from him.'" There is a report from Asádi of the answer to his questions, received by him from Umri, who received the same from the Imám of the age (Imám-i-Mahdi), may my life be sacrificed for him! (The report is as follows):—'As to your question about a person who makes a *waqf* in our favor, and makes the property ours, and who afterwards requires it, the owner

1892
 AGHA ALI
 KHAN
 v.
 ALTAF
 HASAN
 KHAN.

* The name or abbreviation of the name of some book.

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

of the property is at liberty as regards the property which has not been made over; but as regards the property which has been made over the owner is not at liberty, whether he require it or not, and whether he stand in need of it or is indifferent to it.' Further on he (Imám of the age) said:—'As to your question regarding a person who has made an estate ours and made it over to a manager who manages it, peoples it, pays out of its income the Government demand (*khiráj*) payable in respect thereof and its liabilities, and makes the remaining income ours, all that is lawful for the person whom the owner of the estate has appointed as the manager thereof, but not for a person other than him.' But the two traditions, as you see, do not directly, or even apparently, show that seisin is a condition for the validity used in the sense of the production of effect; which is ownership and the like; because the two traditions are necessarily in conformity with each other in showing that seisin is a condition for obligation. The use of the principle appears in an accession made between a contract and seisin. But in (*) and (†) it is denied repeatedly that there is any difference of opinion as to seisin being a condition for validity; nay, the two books even show that the opinion is unanimous." (*Jau áhir-ul-Kalám*).‡

* † Abbreviations of the names of some books.

‡ فلا يبرم عقد الوقف إلا بالاقباض الذي هو القبض بالأذن فليس منها حق نسخه قبله وهذا لا ينافي كونه مع ذلك من شرائط الصحة التي هي بمعنى ترتيب الأثر من ملك الموقوف عليه المنفعة وغيرها كما سيصرح به المصنف وغيره بل نرى عليه البطلان بموت الواقف قبله وغيرها ضرورة كون المراد هنا بيان عدم اللزوم قبله كما من بعض العامة أو بيان أن وقوع العقد لا يقتضي وجوب الاقباض الذي هو من شرائط الصحة وإن تولد من نظير المقام جمعا بين قوله تعالى أو فوا وما دل علي اعتبار في الصحة التي هي بمعنى ترتيب الملك ونحوه إنه هو مع أنه مناف لا صالة البراءة وغيرها لا يوافق ما دل هنا علي اعتبارها مما هو كالصريح بل عريخ في لادن بالسفسخ قبل حصوله وأنه لا إثم عليه قال صفوان في الصحيح صالت عن الرجل يوقف الضيعة ثم يبدء له أن يحدث في ذلك شيئا فقال إن كان وثقا لوئدة ولغيرهم ثم جعل لها فيما لم يكن له أن يرجع وإن كانوا صغارا وقد شرط ولأيتها لهم حتي يبالغوا في تجاوزها لهم لم يكن له أن يرجع فيها وإن

Similar is the effect of another work of high authority in the *Shia* law, namely, the *Sharah Lamah Damishkia*, which I now quote, not only as relevant to the point now under consideration, namely, the necessity of delivery of possession, but also as introductory to the next step of reasoning, which I shall adopt in this judgment relating to testamentary power in the *Shia* law for creation of *waqfs*. The *Sharah Lamah Damishkia* runs as follows:—

“The *waqf* does not without seisin become obligatory after the completion of the words constituting it. So if a *waqf* be made for a public purpose, the superintendent of *waqf* property or the ruler, or the manager appointed by the *wāqif* to take possession thereof, should take possession of it, the happening of such possession will be recognised if it happen by the permission of the *wāqif* because disposition of another's property is prohibited without his permission. The fact is that a *waqf* property is not at all transferred to the *maukuf-alaih* (beneficiary) without seisin. If the *wāqif* die before possession for which he gave permission the *waqf* becomes void. A tradition reported from Obeid, the son of Zurarah, is clear on this point, and it shows that immediate possession is not important. Apparently the same is the case with

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

كانوا كباراً لم يسلمها اليهم ولم يخاصموا حتي يحوزوها عنه فله ان يرجع فيها
لأنهم لا يحوزونها عنه وقد بلغوا ومن الاسدي فيما ورد عليه من جواب مسأله
عن المعري عن صاحب الزمان (روحي القداء) واما ما سألته عنه من
الوقف علي ناحيتنا وما يجعل لنا ثم يحتاج اليه صاحبه ما لم يسلم وصاحبه
فيه بالخيار وكل ما سلم فلا خيار فيه لصاحبه احذاج ان لم يحقج افقر اليه
او استغني عنه الي ان قال واما ما سألته عنه من امر الرجل الذي
يجعل لنا حديثنا صتيعة ويسامها من قديم يقوم فيها ويعمرها ويوردي من دخلها
خراجها ومؤنقها ويجعل ما بقي من الدخل لنا حديثنا فان ذلك جائز لمن
جعلها صاحب الصيعة فيما عليها انما لا يجوز ذلك لغيره لكن هما كما توي غير
صريحين بل ولا ظاهرين في اشتراطه في الصحة بمعنى توجب الاثر الذي
هو الملك ونحوه ضرورة انطباق ما بينهما علي كونه شرطاً في المارو ونظر المارة
فمن الغباء المتخيل بهنهما لكن في صحه وفي لك نفى الخلاف فيه عن
كونه شرطاً فيها مؤكداً فيهما اجماع علي ذلك — (جواب المسأله) *

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

the death of the *maukuf-ataih*, though there is possibility that his heir may stand in his place. From the negation of obligation by him (the author of *Lamah*) it may be understood that the contract is valid before seisin, so that the transfer of ownership is unsure and becomes absolute by means of seisin: other authors have said so in express terms. It is apparent from the "*Durus*" that seisin is a condition for validity. The use of this principle appears in the case of accession between the contract and seisin. Obligation may possibly be taken here in the sense of validity, and it is inferred from the circumstance that a *waqf* is said to be void if the *waqif* dies before seisin, which circumstance is due to invalidity and not to the absence of obligation. So it is stated in the chapter on "Gift" in the "*Durus*." From what some of the masters have said in this matter it appears that the author may have meant (validity.) (*Sharah Lamah Damishkia.*)*

Briefly stated, the effect of these texts is to sustain the following propositions:—

- (1) That the *Shia* law (as distinguished from the *Sunni* doctrine) regards *waqf* a transaction falling under the category of contract (*aqd*, عقد *pactum*) *inter vivos*.

* ولا يلزم الواقف بعد تمام الصيغة بدون القبض فان كان في جهة عامة قبضا الناظر فيها او الحاكم او القيم المنسوب من قبل الواقف لقبضه ويعتبر وقعة باذن الواقف لغيره لامتناع التصرف في مال الغير بغير اذنه والحال انه لم ينتقل الي الموقوف عليه بدونه فلو مات الواقف قبله اي قبل قبضه لمستند الى اذنه بطل و رواية مبني ابن زراره صريحة فيه ومنه يظهر انه لا يعتبر فوريته والظاهر ان موت الموقوف عليه كذلك مع احتمال قيام وارثه مقامه ويفهم من نفيه للزوم بدونه ان العقد صحيح قبله فينتقل المالك انتقالا لا مقرونا لا يتم بالقبض و صرح غيره وهو ظاهرة في الدروس انه شرط الصحة و تظهير الفائدة في التماه المتخلف بينه وبين العقد ويمكن ان يريد هذا بالزوم الصحة بقريضة حكمه بالبطالان لو مات قبله فان ذلك من مقتضى مد الصحة لا الزوم كما صرح به في هبة الدروس واحتمل ارادته من كلام بعض الاصحاب فيها — شرح لمعة دمشقية كتاب الوقف *

- (2) That *tangiz*, تنگیز (i.e., immediate operation of the transaction absolute and unconditional), is one of its essential elements.
- (3) That actual delivery of possession by the *wāqif* (i.e., appropriator) himself or by his permission is a condition precedent to its validity and effect.
- (4) That acceptance by the beneficiaries of the *waqf* is essential for its validity, except in cases where by the very nature of the *waqf* such acceptance is impracticable, such as in the case of a mosque and charitable endowment in favour of mendicants in general (*faqirs*, فقیروں) that is, the indigent public.
- (5) That suspension of a *waqf*, that is, the rendering its operation contingent upon any future event, but that event certain to occur or uncertain to occur, is absolutely void.

1892
 AGHA ALI
 KHAN
 v.
 ALTAF
 HASAN
 KHAN.

Then comes the last part of the case so far as the first question referred to the Full Bench is concerned: and I think it can be conveniently dealt with along with the second question referred to the Full Bench, because the original texts of the *Shia* law are common to both. The turning point is the extent of the testamentary power in the *Shia* law as to the creation of *waqfs* that is to say, the power to render such transfers of property valid without delivery of possession *inter vivos*. Upon the general testamentary power of the *Shias* the ruling of the Privy Council in *Nawab Aminood-dowlah v. Syud Roshun Ali Khan* (1) was cited, and it was there held that a nuncupative will by a Muhammadan of the *Shia* sect bequeathing property less in amount than one-third of his estate was valid, and that such bequest would have been valid even if beyond a third of the testator's estate, provided the heirs concurred in the bequest.

I have mentioned this case because it is the principal judicial authority cited in support of the proposition pressed on behalf of the plaintiffs that under the *Shia* law, notwithstanding the fact that

(1) 5 Moo. I. A., 199.

1892

AGHA ALI
KHAN
v,
ALTAF
UL-ASAN
KHAN.

waqf is a contract, notwithstanding the fact that *tanjiz*, تانجيز, and delivery of possession are its essential conditions, yet *waqfs* may be created by testamentary disposition without immediate operation and actual delivery of possession of the appropriated property.

Now I proceed to show from the most authoritative texts of the *Shia* law itself that this contention is unsound and proceeds upon obliviousness of the exigencies of the contract of *waqf* as understood under that law. I will first quote the authorities and then discuss them.

The first authority which I quote in the *Sharā'iy-ul-Islām* together with its commentary the *Masālik-ul-Afhām*.

These texts are as follows:—

“Seisin is a condition for the validity of a *waqf*. So if a person make a *waqf* and then die without delivering possession, the *waqf* property shall become a heritage.” (*Sharā'iy-ul-Islām*, Calcutta edition, p. 237.)*

“Seisin is a condition for the validity of a *waqf* * * *. There is no difference of opinion among us as to seisin being a condition for the completion of a *waqf* as regards its taking effect. This means that the transfer of ownership depends upon proposal, acceptance and seisin. So a contract forms a part of the cause effecting the transfer and seisin completes it (the cause). Hence before possession a contract is valid in itself; but the transfer of ownership is not effected thereby, and therefore it may be revoked before seisin and is rendered void by death before seisin. The accession made between a contract of *waqf* and seisin is for the *waqif*. This shows that seisin is one of the conditions for the validity of a *waqf*, as stated by the author and many others. But some of the jurists state that seisin is a condition for obligation. They, however do not mean anything other than what we have mentioned, though the word ‘obligation’ gives rise to the possibility of the contract being complete, affecting a transfer of ownership not

* والقبض شرط في صحته قلو وقف ولم يقبض ثم مات كان ميراثا —

(شرائع الإسلام مفسحة ٢٣٧ مطبوعة كلكته) *

obligatory in its nature, as in the case of the ownership of a thing sold during the period of option; whereas on such a supposition an accession made in the interval would be for the transferee, and such is not the case here unanimously. By the fact of seisin being a condition for obligation the author has meant nothing beyond that either the contract is neither complete nor so obligatory as to take effect, or the transfer is not obligatory and is not constituted without seisin or the like. That it is lawful to revoke a *waqf* before seisin according to all opinions appears from a correct tradition reported by Safwan, son of Yahya, from Abul Hasan (peace be with him?) Safwan says:—‘I asked him (Abul Hasan) about a person who made *waqf* of an estate, and in whose mind it entered afterwards to make some alteration in the *waqf*.’ There upon Abul Hasan says:—“If the person made a *waqf* of his estate in favour of his children and others, and appointed a manager of the estate, it is not open for him to revoke. If they (the *maukuf alayhim*) are minors, and having stipulated the superintendence thereof on their behalf till their attaining majority manages the estate on their behalf, it is not open to him to revoke the transaction. If they are of age and he did not deliver the estate to him, while they did not litigate for taking the management thereof from him, then it is open for him to revoke the transaction; because, notwithstanding their being of age they do not take the management thereof.” That a *waqf* is rendered void by the death of the *waqif* before seisin appears from a tradition reported by Obeid, son of Zurarah, from Abu Abdullah that in the matter of a person who made a *sadaqah* in favour of his children who were of age Abu Abdullah said:—‘If they did not take possession till he died, the property becomes an heritage: but if he made a *sadaqah* in favour of his child who has not attained majority it is valid; because it is the father who controls the child’s affairs.’ The masters have understood from the tradition that *sadaqah* means *waqf*; and they use it as an argument for what we have mentioned; though there is a possibility of the word *sadaqah* being used in its particular sense, in which case the tradition is no argument. It (that *sadaqah* means a *waqf*) is supported

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

by what Abu Abdullah said at the end of the tradition, namely, that a person 'cannot revoke a *sadqah* if he made it to seek the favour of God, the Most High,' which provision is applicable to a *sadqah-i-ammah* (public charity) specially, and not to *waqf*. It is obvious that the death of a *maukuf-alaih* (beneficiary) is like the death of a *waqif* (author of trust); for such being the case with an optional contract, the same case will a *fortiori* be with one whose ownership is not complete: but the learned have contented themselves with what has been reported. There is a possibility here of the second generation representing the *maukuf-alaih* as regards seisin. The distinction between the two deaths is that the death of the *waqf* transfers his property to his heir, and this necessitates voidness, in the same manner as if he has transferred his property in his lifetime: but the case is different with the death of the *maukuf-alaih*, in which case the property remains in its original state and has not been transferred to another owing to imperfectness of ownership. The other of——* has hesitated as to the validity of a *waqf* in case the second generation take possession; but he (the author of the book) has not mentioned it in any other book, nor has any person other than the author mentioned it. Lunacy and swoon are treated like death. Now, this having been settled, the seisin deserving consideration here (in *waqf*) is the same that deserve consideration in sale, and we have shown it there. The more forcible opinion is that immediate seisin is not necessary, because of the constitution of the origin and the absence of any argument showing it (the importance of immediate possession). The above two traditions direct to it (immediate seisin not being necessary), because voidness in the absence of seisin has been suspended till death, which fact proves that seisin, whenever obtained before death, is sufficient. There is a possibility of immediateness being worthy of consideration, because seisin is an ingredient in a contract, and stands for acceptance, specially according to the opinion that acceptance is not a necessary condition. In this (immediateness

* Abbreviation of the name of some book,

being worthy of consideration) *seisin in wagf* differs from *seisin in sale* where ownership and the contract are complete without *seisin* and consequently immediate *seisin* is not at all necessary for its taking effect." (*Masālik-ul-Afshūm*).*

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

* والقبض شرط في صحة الخ — لأخلاق مندنا في اشتراط القبض في تمامية الوقف بحيث يترتب عليه اثره بمعنى كون انتقال المالك مشروطاً بالاجماع والقبول والقبض فيكون العقد جزء السبب الناقل وتمامه القبض فقبله يكون العقد صحيحاً في نفسه لكنه ليس بناقل للملك فيجوز فسخيه قبله ويبدل بالموت قبله والنماء المتخلل بين العقد والقبض للواقف و بهذا يظهر ان القبض من شرائط صحة الوقف كما عبر به المصنف و جماعت ولكن بعضهم عبر بانه شرط للنزوم ولا يريدون به معنى آخر غير ما ذكرناه و ان كان من حيث اللفظ مستلزماً لكونه عقداً تاماً ناقلاً للملك نقلاً غير لازم كالمالك في زمن الخيار للمبيع فان النماء المتخلل على هذا التقدير للمنتقل اليه وليس كذلك هنا اتفاقاً و نما اراء يكونه شرطاً في النزوم ان العقد لا يتم ولا يلزم بحيث يترتب عليه اثره او ان الانتقال لا يلزم ولا يتحقق بدونه و نحو ذلك — و تدل على جواز الرجوع فيه قبل القبض مع الاجماع صحيحة مفروان ابن يحيى عن ابي الحسن عليه السلام قال سئلته عن الرجل يوقف الضيعة ثم يهدله ان يحدث في ذلك شيئاً فقال ان كان اوقفها لولده و لغبرهم ثم جعل لها قيميا لم يكن له ان يرجع و ان كانوا صغاراً و قد شرط ولا يتها لهم حتى يبلغوا فيجوز هالهم لم يكن له ان يرجع فيها و ان كانوا كباراً ولم يسلمها اليهم ولم يخاصموا حتى يجوزها عنه فله ان يرجع فيها لانهم لا يجوزونها وقد بلغوا وعلى بطالته بموت الواقف قبله رواية عبيد بن زرارة عن ابي عبد الله انه قال في رجل تصدق على ولده قد ادركوا فقال اذالم يقبضوا حتى يموت فهو ميراث فان تصدق على من لا يدرك من ولده فهو جائز لان الوالد هو الذي يلي امره وقد فهم الا صحاب من الحديث ان المراد بالصدقة الوقف واستدلوا به على ما ذكرناه مع احتمال ان يريد بالصدقة معناه لخاص فلا يكون دليلاً ويؤيده قوله في آخر الحديث وقال لا يرجع في الصدقة اذ تصدق بها ابتغاء وجه الله تعالى فان هذا احكم من خواص الصدقة العامة لا الوقف والظاهر ان موت الموقوف ملية قبل القبض كموت الواقف لان ذلك هو شان العقد الجائز فضلاً عن الذي لم يتم ملكه ولكنهم اقتصروا على المزى و يحتمل هنا قيام البطلان الثاني مقامه في القبض و يفرق بينهما بان موت الواقف ينقل ماله الى وارثه و ذلك ينفق البطلان كماله فله في حياته بخلاف موت الموقوف ماله فان المال بحاله دام ينتقل الى

1892

AGHA ALI
KHAN
v.
ALTAH
HASAN
KHAN.

Another authority of great consequence is the *Jawāhir-ul Kalām* a well-known commentary of the *Sharā'ih-ul-Islām*, and it runs as follows consistently with the preceding commentary :—

“So where a person makes a *wagf* and then dies before seisin the *wagf* is void and becomes an heritage in the former case, nay even in the latter case. Similarly a *wagf* becomes void if the *wāqif* turns mad or swoons, as is the case with all the conditions of validity, when in the course of the fulfilment of those conditions there comes something which bars them before the completion of the cause, namely, what is apparently shown to be the cause, or which is caused to be believed to be so; by the importance of the continuance of capability till the completion of the cause; and there is no distinction (in this matter) between the proposer, the acceptor and the subject-matter of the contract. Hence there seems no difference of opinion among the masters, in all matters, as to a cause becoming a nullity by being barred in the course of its completion, though the bar may cease to exist afterwards. But if we say that seisin is a condition for obligation, then, the *wagf* is nullified by the death of the *wāqif* under the correct tradition to be mentioned hereafter, on the ground that the word '*sadaqah*' occurring in it means *wagf*.” (*Jawāhir-ul-Kalām*).*

غیرہ لعدم تمامۃ الامک و فی یترقف فی صحۃ اذا قبض البطن الثانی ولم یدکر
فی غیرہ ولا غیرہ و فی معنی الموت المجنون والاعماء اذا تقرر ذلك فالقبض المعتمد
هنا هو المعتمد فی البیع و تصدقناہ ثمہ والاقوی ان لا یشتط فیہ الفوریۃ لعقد الاصل
وانقضاء دلیل یدل علیہ و فی الروایات السابقتین ارشاد الیہ حیث عاق البطلان بعدم
القبض الی ان یموت فان منقضاء الائتفاء قبل الموت معنی حصل ویحتمل
اعتبار القوریۃ لانه رکن فی العقد فیجری مجری القبول خصوصاً علی القول عدم
اشتراط القبول و بهذا یفارق قبض البیع فان الامک والعقد یتکم بدونه فلا یشترط
فی تحقق حکمہ فوریتہ قطعاً -- (مسالك الافهام) *

* فلو وقف ثم مات قبل القبض بطل و كان ميراثاً علي الاول والثاني
او كذا يبطل لو جن او غمي عليه كما هو الشأن في جميع شرائط الصحة
اذا حصل المانع منها في انائها قبل تمام السبب الذي ظاهره ما دل على سببية
الامكيق منه إجماع دوام التاميل الي تمام السبب من غير فرق بين الموجب

To these texts which were cited upon the point now under consideration I may add the following, which is from the *Jāmi-ul-Maqāsīd*, and which, whilst an authority on the Shia law, is not a commentary on the *Sharā'iy-ul-Islām*, for it is a commentary on another text of high authority, namely, the *Qawā'id*. The *Jāmi-ul-Maqāsīd* has the following :—

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

“ Possession is a condition for validity of it (*waqf*), and if he (the *wāqif*, appropriator) has made a *waqf* but has not delivered the appropriated property and has then died, the property becomes inheritance in consequence of the *waqf* being void because of the absence of its essential condition, and this doctrine is explained in the tradition stated by Obeid Ibn-i-Zurarah from (Imam) Sadiq, on whom be peace.”*

But it has been argued by Pandit *Sundar Lal* that in cases (such as the will of Muhammad Ali dated the 3rd of November 1863, to which this discussion relates) where a *waqf* is created and delivery of possession and acceptance have not taken place, the *waqf* does not become void but takes effect as a will to the extent of one-third of the property of the deceased appropriator. For this contention he relies, *inter alia*, upon the following texts of the *Mabsut* :—

“ If the transfers are to come (into effect) after death ;—*thus*— in the case of a *waqf* made by a will or when he directed manumission of a slave by his will, or, when he made a will for the sale of a house at a nominal price, and others like it :—

والتقابل والعين الذي هي متعلق العقد ومن هذا لم يظهر خلاف بين الاصحاب في سائر المقامات في بطلان لسبب بعرض المانع في اثباته وان زال بعد ذاك نعم لو قلنا بكونه شرط للزوم انفسخ بموت الواقف الصحيح الاتي بناء على ارادة الوقف فيه من الصدق — (جواهر الكلام) *

* قوله والتقبض شرط في صحته فلو قفّر لم يسلم الوقف ثم مات كان ميراثاً لبطان الوقف بانقضاء شرطه وقد ورد التصريح في رواية مجيد ابن زرارّة عن الصادق عليه السلام — (جامع المقاصد ككتاب الوقف) *

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

"If one-third of the property be sufficient to meet all this, it will be done accordingly. If one-third be not sufficient to meet all this (and there be no will for the manumission of a slave) the one-third will be applied to meet them all in proportionate shares and none shall have preference over the other, because all these must come into effect *at once*, viz.:—on the (date) of death. This is according to the saying of the opposite sect i.e., the *Sunnis*. According to us the first-mentioned will have preference over the next and so on till the one-third is exhausted." (The *Mobsut* by Sheikh Abu Jafar, p. 273, lines 23 to 25.)*

In quoting this text I have quoted the translation furnished by Pandit *Sundar Lal*, but before dealing with the text I wish to point out a serious error in it, which is more important than a merely verbal criticism. The text in the opening part in enumerating various kinds of grants which are intended to take effect after death mentions as an illustration wills for *waqfs*. The original Arabic words are *ملك إن يوصي بوقف* which in the learned Pandit's translation is rendered in the following words:—"In the case of a *waqf* made by a will." The literal and grammatical translation should be in the following words:—"For instance, if he make a bequest for a *waqf*," which, taken with the context, means that the deceased has given a testamentary direction to his legal representatives to appropriate a certain portion of his property towards charitable endowments according to the terms of the bequest. It does not mean that the execution of a will can *ipso facto* create a *waqf in præsenti*. In other words, the text properly understood does not lay down any rule as to the constitution and requisites of a *waqf*, but lays down rules as to the administration of the estate of a deceased testator.

* فاما اذا كانت العطايا مودعة ملك إن يوصي بوقف او عتق اربيع بمساكنات وما اشبه ذلك فان وفي الملك بالجميع فذاك وان لم يف بالجميع فان لم يكن في جماعتها عتق قسم الذات ما يهب بالجميع وان لم يقدم بعضها على بعض لانها كلها تكتسب في وقت واحد وهو وقت الموت هذا عند المخالف و منذنا انه يقدم الاول فالاول ملك الاول — (عبارت مبسوطه صفحه ٢٧٣ باب الوقف) *

The importance of the distinction which I have thus drawn will become more clear as I deal with the other texts cited by Pandit *Sundar Lal* himself on behalf of the plaintiff. One of these is the following from the *Tahrir-ul ahkām* of Allama Hilli :—

1892

AGHA ALI
KHAN
2.
ALTAF
HASAN
KHAN.

“If he had said :—‘ Make ye a *waqf* after my death in such a fashion,’ that becomes a *wasiyat-bil-waqf*, (وصية بالوقف) (testament for a *waqf*). It must be taken out of one-third. And if he had said :—‘ That is *waqf* after my death,’ then in its being *wasiyat-bil-waqf* (which is) lawful or *waqf* contingent upon death (which is void there is *nazar*, نظر”. *

Both Pandit *Sundar Lal* for the plaintiff and Mr. *Karamat Husain* for the defendants agree in the accuracy of this translation of the text, and I also approve of it as a good literal translation. They are, however, not agreed as to the meaning of the last word in the text, namely *nazar*, نظر. Pandit *Sundar Lal* maintains that the word is a technical word indicating that the point is an unsettled one. I may say at once that the word literally means *cogitation*, and it does imply that the rule to which it refers is not a settled matter and requires consideration.

Before proceeding further I may quote another text relied on by Pandit *Sundar Lal* and Mr. *Karamat Husain* on behalf of their respective clients, but they are not agreed as to the exact meaning and import of the text. I am therefore responsible for the following translation, which I will make as close and literal as linguistic exigencies will allow :—

“And if he said :—It is *waqf* after my death — this is susceptible both of being void, as it is suspension (of the *waqf*), and of being predicated as convertible into a *wasiyat-bil-waqf*, because it (the sentence) is more expressive than his saying :—‘ Make it a *waqf* after my death.’ Its (the phrase’s) use in making wills

* لَر قال قفروا بعد موتى كذا كان وصية بالوقف يخرج من الثلث ولو قال هو وقف بعد موتى ففي كونه وصية بالوقف صحاحته او وقفا مشروطاً بالموت باطلا نظر — تحرير الاحكام عالمه هاى صفحه ٥١٦ *

1892
AGHA ALI
KHAN
Q.
ALTAF
HASAN
KHAN.

is frequent, and this is the more correct, because it is (means disposal of his property to take effect after death, which is the meaning of *wasiyat* (testamentary disposition).” (*Itih* of Allama Hilli, p. 355).*

In order to explain the controversy between the parties based upon these two texts it is necessary to state that there are two Arabic phrases which must be distinctly borne in mind as they occur in the texts. These phrases are—

- (1) *Qifu baada mauti kaza* (قفوا بعد موتي كذا) which means—
“Make ye a *wagf* after my death, thus.”
- (2) *Hawa wagfun baada mauti* (هو وقف بعد موتي) which means—*It is wagf after my death.*

Now the *Shia* law attaches stringent importance to technical formalities and expressions employed. So far as the first of these phrases is concerned, it is admitted on all hands that it amounts to a testamentary direction to the heirs to make a *wagf*, that is, to appropriate property to the purposes and in the manner indicated by the testator. Such testamentary direction is technically called *wasiyat bil-wagf* (وصية بالوقف), that is, bequest for the purpose of a *wagf*, which falls under the same category as other similar dispositions such as those described in the text from the *Mabsut* which I have already quoted; and it cannot be doubted that under the *Shia* law (as, indeed, also under the *Sunni* law) such legacies are to be carried out to the extent of one-third of the estate of the deceased, subject to such rules and restrictions as govern the administration of the estate of a deceased person, by his legal representatives, with reference to his debts and other legal liabilities of his estate. Indeed, there is no contest between the parties as to this point, and I need not therefore dwell upon it any further.

* ولو قال هو وقف بعد موتي احتمل البطلان لانه تعليق وأحكام بصرفه الي الوصية بالوقف لانه ابلغ من قوله قفوا هذا بعد موتي والاصح في الوصية كغيره وهو الاصح لانه تصرف مالي معلق بالموت وهذا معنى الوصية (يضاح تصنيف فقهاء الامامية في وصية عاصم هادي صفحة ٢٥٥) *

1892

AGHA ALI
KHAN
V.
ALTAH
HASAN
KHAN.

The real controversy relates to the second phrase, viz :—" *Is it waqf after my death* " (هو وقف بعد موتي) and much in the texts which has been cited is devoted to discussing the exact signification, import and effect when it is employed. Now the word *waqf* (وقف), being a noun, does not in itself import either any tense or direction such as the imperatives (قفوا) which occurs in the first phrase. This being so, doubts have arisen as to whether the phrase in which it occurs when used has the signification of being a *wasiyat-bil-waqf* (وصية بالوقف) that is, a testamentary direction to heirs for (*waqf*), in which case it would be valid, or whether it signifies a *waqf-bil-wasiyat* (وقف بالوصية), that is a *waqf* suspended or contingent upon the death of the *wāqif*, which being a future event would render the *waqf* void under the *Shia* law.

The manner in which the question of preference between these two alternative interpretations is discussed by the *Shia* authorities is well illustrated by a text of the *Jāmi-ul-Maqā'id* upon which both the parties have relied. The text in the original Arabic runs as follows :—*

* ولو قال هو وقف بعد موتي احتمل البطلان لأنه تعليق والحكم بصونه الي الوصية بالوقف لأرب أنه لايراد بهذا الصيغة الخبر قطعاً قبضي إن يراد بها انشاء وهي بنفسها إما يدل مطابقة علي انشاء الوقف بعد الموت بهذه الصيغة المتاني بها الآن وذلك يقتضي البطلان لا خلاله يكون الصيغة سبباً تاماً في حصول الوقف بل يكون لحصول الموت دخل في ذلك و ذلك معنى التعليق فيكون باطلاً لأن العقود إنما يصح إذا كانت سبباً تاماً في انشاء ما يطلب بها والا لم يترتب عليها أثرها وذلك هو معنى البطلان ولا دلالة لها على الوصية الا بتكلف تقدير لا يدل عليه اللفظ ولا يدل عليه دليل بان ينزل على ان المراد ارادة جعله وقفاً بعد الموت و ارتكاب مثل ذلك تعسف محض و اجراء الاحكام الشرعية على امثال هذه الالفاظ التي لا دلالة لها على المراد من الامور المستبعدة جداً فقد سبق انه لو قال قائل الاخر اقبض ديني الذي على فلان لك لم يصح و ان كان الامر ذدين منذ الامر و قد سبق في الوكالة انه لو قال اشتري بعاك كذا لم يصح مع ان المراد معلوم والتقدير ممكن والاحتجاج بان ذلك مستعمل في الوصية كثيراً و بان الاصل الصحة ولا يتحقق إلا بالعمل ضعيف لمانع الاستعمال المدمي والنظام عدم تأثيره مالم يصح معنى اللفظ حقيقة او مخرجا

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

The parties have put in their translations of this text, but they are not agreed as to the interpretation and import of some words and phrases, and I have therefore compared the two translations and the original and am responsible for the accuracy of the following translation :—

“ And if he said ;— ‘ it is *waqf* after my death,’ this is susceptible both of being void, as it is suspension of the *waqf*, and of being predicated as convertible into a *wasiyat-bil-waqf*. There can certainly be no doubt that by such a declaration (صيغة) predication is not intended. It then remains that by the declaration making an offer was intended ; and this in itself indeed indicates nothing other than conformity with offer for a *waqf* after death by means of the declaration (صيغة) just mentioned above ; and this matter requires nullity by reason of its disturbing the rule relating to the declaration (صيغة) being a complete cause for the constitution (مصول) of *waqf*. But the occurrence of death enters into the matter as one of its constituent elements. This is exactly what is meant by *ta'alik*, تعليق (suspension). Therefore it is void because contractual words are not regarded as correct unless they themselves be the perfect cause of the creation of what is intended by them ; otherwise the desired effect will not follow, and this is what is meant by nullity. There is no indication in it (the declaration, صيغة, used) of a *wasiyat* except by putting an affected construction which the words do not warrant or indicate, and there is no authority for constraining it to mean :— ‘ I intend it to be made *waqf* after my death ;’ to put such a construction is a pure deviation from the right path (تعسف محض) and to pass legal orders upon words of this kind when do not

وامالة لصحة في الصيغة المذكورة لا يقتضي جعلها وصية مالم ينضم اليها ما يدل على ذلك وفي حواشي شيخنا الشهيد ان هذا اذا لم يعلم القصد فان علم فله بحث وفيه نظر لان مجرد القصد لا تأثير له مالم يوجد اللفظ الدال عليه حقيقة او مجازاً والذي يقتضيه النظر وسبق الحكم في نظائره البطلان نعم لو شاع استعمال ذلك في الوصية واشتهر لم يبعد القول بصحة الوصية—(جامع المقاصد باب الوقف صفحة ٥١٦ و ٥١٧) *

indicate the intention (of the speaker) is a matter extremely far-fetched (مستبعد).

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

It has already been stated that if one says to another:—
‘Take possession of the debt due to me by such a one for yourself,’
it is not valid, although the person ordered has a debt due to him
by the person who orders; and it has been stated on agency that
if he says:—‘Purchase such a thing for me by thy own goods,
it is not valid, notwithstanding that the intention is known, and to
put such a construction is possible.

“The contention that such words are frequently used in wills
and that validity is the legal presumption and that it cannot be
realized without transferred meaning is futile (doctrine), because
of the prohibition of the use so claimed and the necessity of its
being ineffective until justified by the real or conventional mean-
ing of the words employed. The presumption (إسالة) of validity
of the above mentioned *sigħa* (صيغة), formula, does not require that
it should be rendered as *wasiyat* unless something is added thereto
indicating the same.

“It is stated in the *Hamāshi* of our *Sheikh* the *Shahid* that
this is the case when the intention is not known, and if known then
there is no controversy. This requires cogitation, because mere
intention has no effect unless the words indicating it really or con-
ventionally are found; and that is required by cogitation and by
what was stated in similar cases points to nullity (of the transac-
tion). Of course, if the use of the phrase in the sense of *wasiyat*
would have been common and well known it would not have been
out of place to regard it as a valid *wasiyat*.” (*Jāmi-ul-Maqasid*,
pp. 516 and 517.)

Understanding this text as I do, I have no doubt that, whilst
dealing with questions of legal interpretation, it lays down the
rule that under the *Shia* law no *waqf* can be created if its opera-
tion is rendered contingent upon any future event such as the
death of the donor. In other words, the text shows that a man
cannot say:—“I created a *waqf* now, but it will take effect upon

1892
 AGHA ALI
 KHAN
 v.
 ALTAF
 HASAN
 KHAN.

my death." Such phrases are dealt with by the *Shia* law as mere phrases expressive of intention, but not constituting a *wagf*, and in the absence of offer, acceptance and actual delivery of possession, the contract of *wagf* is not constituted, and therefore what is known to jurisprudence as the transvestitive fact does not occur till actual delivery of possession to the *maukuf-alaih* (موقوف عليه), that is the person in whose favor the *wagf* is made, except, of course in cases where by the very nature of the *wagf*, such as in the cases of a mosque and public mendicants, the acceptance of such possession is impossible.

I have already said enough to show what the effect of death of the *wagif* (واقف) before delivery of possession is upon the validity of the *wagif*, namely, that the *wagf* becomes void and the property is dealt with as the estate of the deceased, subject to the laws of inheritance and administration of his estate. This view is by analogy in full keeping with the principle of another class of dispositions of property requiring actual delivery of possession as the condition precedent to the validity of the transaction; I mean *hiba* (hiba) or gift, which again is regarded by the *Shia* law as a contract subject to the doctrine of *tanjiz* (تنجيز), already explained. There the rule in connection with that and common to *wagf* is laid down in the *Shar'iyi-ul-Islam* to be that:—

"If the donor should die after the contract and before possession has been taken of the gift it falls back into his inheritance. Permission of the donor is a condition of valid seisin, and if the thing given be taken possession of without his permission it is not transferred to the donee." (Baillie's *Imameen Law*, page 204).*

The stringency with which the *Shia* law regards as void *wagfs* which are not unconditional and absolute and in pursuance of which actual delivery of possession has not taken place is well illustrated in the *Jami-ul-Shattat* in the form of question and

* ولومات الوهب بعد العقد و قبل القبض كانت ميراثا وبشروط في
 صحة القبض اذن الواهب قار قبض الموهوب من غير اذنه لم ينتقل الى الموهوب
 له (شرائع الاسلام مطبوعة كلكته صفحہ ۲۱۴۲) *

answer. I will quote the original text, as also the translation, for which I am responsible, as it was not cited by either of the parties, though it comes nearest to the facts of the case, out of which this reference has arisen. The original text is as follows (p. 349, Tehran edition):—

1892.

AGHA ALI
KHAN
V.
ALTAF
HASAN
KHAN.

The authoritativeness of the work from which this text is taken is undoubted, for both parties have relied upon the book in the course of their arguments. The following is my translation of the original text:—

“*Question.*—Whether when a person makes a *waqf* and provides that the *mutawalli* shall after the date of the *waqif* employ the profits of the property for holding prayers and fasting—is such a *waqf* to be regarded as a *waqf* for himself (وقف بر نفس) or the taking out of the *waqif* (from the proprietorship of the property)? Are entire profits to be regarded of this kind, or there is any distinction between what applies to the whole and a portion thereof?

“*Answer.*—The accepted opinion (ظاهر) is that such a *waqf* is a *waqf* on one's self (وقف بر نفس) or a condition reserving profits for himself from the *waqf*; and since it thus becomes dependent it also has another defect, namely, that destructive of the original transaction itself, because so long as the *waqif* lives there is no beneficiary of the trust. The accepted opinion is that no difference exists (as to the applicability of the rule) between the whole or a part.”

The general effect of the text may be stated to be that such a *waqf* when rendered contingent for its operation on the death

* سوال—آیا شخصی ملکه وقف نماید و از منافع آن قرارداد نموده که متوفی بعد از وفات واقف بجهت او استیجار صوم و صلوة نماید هم چه وقفی وقف بر نفس است یا اخراج نفس درین صورت صادق می آید یا مجموع منافع از این قبیل باشد یا بعضی آن تفاوت دارد - جواب ظاهر این است که داخل وقف بر نفس است یا شرط انتفاع خود از آن و هرگاه منحصر باشد بر این عیبی دیگر هم دارد که منقطع الارست چون مادام الحیوة موقوف عاید ندارد و ظاهر این است که کل و بعضی نفی ندارد - (راجع الاشکات مطبوعه طهران صفحه ۳۴۹) *

1892
 AGHA ALI
 KHAN
 v.
 ALTAF
 HASAN
 KHAN.

of the *wāqif* is invalid, as, during the continuance of the *wāqif's* life, he would continue to enjoy profits, and therefore it could not be regarded as "entirely taken out of the *wāqif*, or appropriator, himself" in the sense of the *Shia* law. (*Vide* Baillie's *Imameea Law*, p. 218.)

On behalf of the plaintiff Pandit *Sunder Lal* has quoted numerous texts, of which he has also filed translations. It would be unduly lengthening this judgment if I were to deal with every one of them separately, and it will be enough if I refer only to the more important and relevant ones. The texts have been cited to sustain the following proposition :—

(1) That a *wāqif* can appoint himself *mutwalli* of the *waqf* property, and therefore delivery of possession is not necessary.

(2) That even when the *wāqif* appoints another person as *mutwalli* of the *waqf*, neither delivery of possession to such *mutwalli* nor acceptance by him of the *waqf* is necessary.

(3) That when the *wāqif* dies before delivery of possession of the *waqf* property, the *waqf* is to be dealt with as a bequest, and should be enforced to the extent of one-third of the estate of the deceased.

(4) That a *waqf* or appropriation *in presenti* may be created, and its operation may be lawfully suspended till the death of the *wāqif*.

(5) That a *waqf* otherwise void becomes validated if the heirs of the deceased *wāqif* consent to its conditions.

Upon the first of these points the following texts have been relied upon :—

"There is no difference of opinion as to the lawfulness of the *wāqif* (author of trust) reserving for himself the *taulit* (control) of the business of the subject-matter of *waqf* and the supervision thereof; for he has the best right to attend to that and to use it for the beneficiaries. Similarly there is no difference of opinion as to the lawfulness of appointing, for the control of the subject-matter of *waqf*, another or another and himself together

or a person not in existence in succession to one in existence, such as by appointing Z who is in existence and his descendant who may be born next after the *wagf*. Verily Fatima (the blessings of God may be with her) entrusted the business of her seven gardens, of which she had made a *wagf*, to the Commander of the faithful (Ali), after him to Hasan, after him to Husain, (peace be with both of them!) and after him to the eldest of her descendants; so has Abu Basir reported from Ali Jafar." (*Sharah-i-Mafatih* by Mulla Hadi, p. 491, lines 1, 2 and 3i)*

The rules of law which this text expounds are really not matters of controversy in this case, because it is not denied that an appropriator can appoint himself as the *mutawalli* of a *wagf*, and that in such a case change in the character of possession amounts to transfer of possession which would be required when the *mutawalli* appointed for the *wagf* is a person other than the *wagif* himself. There is nothing in the text to show that delivery of possession as a condition precedent to the validity of a *wagf* is dispensed with in cases such as the present, where the *wagif* did not appoint himself as *mutawalli*, but, on the contrary, specifically named and appointed Muhammad Taqi to be the *mutawalli*.

Similar remarks apply to the next text relied upon, which runs as follows:—

"And it is in the *Hadees* that Amir-ul-Mominin endowed his property for obedience and love of God and sympathy to his relatives and after it made Imám Hasan the trustee of the *wagf*, and after him Imám Hussain, and after him the person whom Imám Husain might appoint, as the case may be, and that the

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

* لاحق في جواز ان يجعل الواقف تولية امرائيه المرقوفة والظفر إليها
لنفسه لأنه احق بان يقرم بذلك ويصرفه في اهله كما لا خلاف في جواران
يجعل توليتها لغيره اوله و لنفسه معاً او معدوم تبعاً لموجود بان يجعل
توليد الموجود و لمن سيولد من ولادة و لقد فرضت فاطمة صلوات الله عليها امر
حوايها السبعة التي وقفها الى امير المؤمنين ثم الى الحسن ثم الى الحسين
عليهم السلام ثم الى الاكبر من ولدها كما رواه ابي بصير عن ابي جعفر — (شرح
مفاتيح ملا هادي صفحة ٤٩٣ سطر ١ و ٢ و ٣) *

1892

AGHA ALI
KHAN
".
ALTAF
HASAN
KHAN.

latter (Imám Hussin) should require the person so appointed trustee to keep the property (*corpus*) untouched, and to divide the usufruct in such manner as Imám Hussain directs for God's sake or for sympathy to the relatives (*i.e.*, children of Hashim and children of Mutallib) whether near or remote, and that no portion of the *corpus* be sold or gifted or transferred by inheritance to any other. So far is the *Hadees*.

"You must have observed that this *Hadees* does not show anything but that after *waqf* it is essential that the *corpus* be untouched and not to change its features and that there should be no interference therein such as those mentioned above or the like and that the usufruct be spent in the manner enjoined by the donor; and this *Hadees* does in no way show that the property endowed can be transferred to any person. This *Hadees* sets aside the general saying that the endowed property is transferred in such cases to the donee, and although this *Hadees* is long enough, there is nothing in it to show that Amir-ul-Mominin gave possession of the property endowed to any person; on the contrary, it shows that he remained in possession of the endowed property during his life-time and used to spend the usufruct thereof in the above-mentioned expenses, that after his death the trusteeship was with Imám Hasan, and after him it was with Imám Hussain, and after him with the person alluded to in the *Hadees*. Therefore had possession been a condition to the validity of the endowment there should have been some hint thereof in the *Hadees*. And to suppose that he held possession as rules is possible, but it is very remote, inasmuch as no authority exist for that (that possession is essential) and the like; whereas you have been informed above that there is no authority that possession is essential in such cases." (*Hudaiy* of Sheikh Yusuf Bahraini, pp. 515 and 516.)*

* وفي حديث وقف امير المؤمنين امره على جهة اطعامات والقربات وصلاة الرحم بعد ان ذكر الولي التقيم بذلك الحسن ثم الحسين ثم ما يتخذه الحسين ماهر موزنة وان اشترط على الذي يجعله الله ان يجعل امان على

It will at once be observed that the case mentioned in the text is one in which the *waqif*, Ali had appointed himself as *mutawalli* of the *waqf* and administered it as such, thus fulfilling the requisite change in the character of possession which takes the place of actual transfer of possession when the *waqif* appoints another person as *mutawalli*. Neither of these texts therefore goes the length of the learned Pandit's contention. Nor is he supported by the text (No. 7) which he has cited from the *Tazkirat-ul-Fukha* by Allama Hilli (p. 433), which need not be quoted as it relates to a *will* made by Fatima, the daughter of the Prophet, and lays down nothing as to *waqf* or delivery of possession to the *mutawalli*.

Upon the second point of Pandit *Sunder Lal's* argument, namely, that even where the *waqif* has appointed a *mutawalli*, delivery of possession is not necessary, he has relied *inter alia* upon the following text:—

“I say, let it not be concealed to the person who resorts to *Hadees* overlooking what lawyers have said. The *Hadeeses*

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

اصوله وينفق الثمرة حيث يامره به من سبيل الله وذوالرحم من بني هاشم و
بني المطلب القريب والبعيد ولا يباح منه شيئي ولا يورث لى غير
ذلك الحديث وليس فيه كما ترى ازيد من انه بعد الوقف يجب ابقاء اصوله
على ما هي عليه ولا يتصرف فيهما بشيئي من هذه القصرات ونحوها و
يصرف الحاصل في الوجه الذي عينه ولا دلالة فيه على الانقضاء لاحد هو ظاهر
في الرد على القول المشهور من انه ينتقل في هذه الصورة الى الموقوف عليه و
ليس في الخبر ايضاً على طول ما يشعر بانه قبضه احد — ابل ظاهرة انه مدة
حيوته كان في يده يصرفه في الوجه المذكور وبعد موته فرض الامر فيه الى الحسن
ثم الحسين ثم من ذكره في الخبر ولركان القبض في هذه الصورة شرطاً في
صحته الوقف لوقع — الاشارة اليه في الخبر واحتمال انه قبضه بالولاية العامة
وان امكن الا ان الظاهر بعدة انه هو فرع وجود الدليل على اشتراط القبض
في هذه الصورة ونحوها وقد عرفت انه لا دليل على ذلك في ما مضى
في الصورة المتقدمة — (مبارك كتاب حدائق — صفحة ٥١٥ سطر ٢٠ لغاية
٢٦ و صفحة ٥١٦ سطر ١ لغاية ٧) *

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

certainly show that when the donee (*maukuf alaih*) is existing the ownership is transferred to him, and consequently the *Hadeeses* contemplate the *condition* of possession on the part of the donee or of the guardian of the donee, so that the ownership of the donee may be completed by possession and so that the donor (*waqif*) may become unable to retract from that act as said in the *Hadeeses* above mentioned. And when the donee be a class, such as beggars, or when the donation be merely charitable, such as mosques, in such cases whatever is the rule which is established by these *Hadeeses* is that the property is excluded from the ownership of the donor; but the *Hadeeses* do not prove whether the property thus given becomes the property of God or of any one else. These *Hadeeses* come to the conclusion that the property after being endowed and after being excluded from the ownership of the donor it is necessary that the subject of endowment should be kept up, and it is not proper and valid to appropriate it by means of sale, gift, inheritance and the like, which deprive it from its character of charity for which it was transferred. Of course, possession has been made a condition to it, as is generally known that possession is conditional to the validity of endowment. In such a case possession will be taken by the trustee appointed by the donor or by the ruler of the faith (lawyer or lawgiver), "*Hakim Sharah*," or by some other person for which there is no provision in the *Hadeeses*. The place wherein these *Hadeeses* require possession to be essential, of course, is a place where the donee is existing, and appointed and specified. (*Hadaiq* of Sheikh Yusuf Bahraini, page 516, lines 8-18.) *

* أقول لا يخفى على من راجع الأخبار و قطع النظر عن كلامهم فان المستفاد منها انه متى كان الموقوف عليه موجوداً مقتصراً فإنه ينتقل الملك إليه و لهذا دلت على اشتراط قبضه او قبض وليه لينتم بذلك الملك و يمنع الرجوع فيه كما تقدمت الأخبار به و متى كان الموقوف عليه جهة مامة كالفقراء او مصلحة كالساجد فان غاية ما يفهم منها هو انه بالوقف يخرج من ملك الوقف و اما انه يصير الى الله سبحانه او غيره فلا دلالة في شيء من الأخبار عليه و انما تدل على انه بعد الوقف و خروجه من ملك الوقف

Now, as I understand this text, far from supporting the argument of the learned Pandit, it has a contrary effect, because it clearly lays down the necessity of delivery of possession as a condition for the validity of *waqf*. The same cannot be said of another text which he has cited, but of which the translation furnished by him is erroneous. The text runs as follows with my translation of it:—

“It appears that seisin is a condition for obligation and not for validity, as is the case with a sale during the period of option; so that by a mere contract a complete transfer is constituted, but the *waqf* can revoke it before the delivery of possession. The accession made between the time of contract and seisin will be for the *maukuf-alaih*, and the death of the *maukuf-alaih* (beneficiary of the *waqf*) in the interval will not vitiate the contract.” (*Sharah* by Mulla Hadi, p. 485.)*

This text no doubt partly supports the Pandit's arguments, but it is opposed to far more authoritative works such as the *Sharayt-ul-Islam* and the *Masalik-ul-Afham* and other text-books which I have already quoted, showing that delivery of possession is not merely a matter of form but an essential element in its constitution, as in the case of *hiba* or gift. The *Sharah Mafatih* by Mulla Hadi is a work of comparatively modern date and is

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

يجب انقاء العين و يجوز التصرف فيها ببيع والهبة والاميراث وانحو ذلك من الامور الموجبة للخراجها مما صارت اليه وصرف حاصلها في تلك الجهة او المصلحة المعينة واما انه يشترط القبض فيها كما هو المشهور من ان القبض شرط في صحة الوقف مط فيجب القبض هذا من القيم الذي ينصبه الواقف او الحاكم الشرعي او غير ذلك فلا دليل عليه في الاخبار و مورد النص فيها انما هو فيما اذا كان الموقوف عليه موجود معيناً محصوراً — (عبارت كتاب حدائق صفحہ ۵۱۵ سطر ۸ لغایت ۱۸) *

* و مستلغور من ظاھرھا ان القبض شرط للزومه لا لصحة كالمبيع في زمن الخيار فيا العقد تحقق النقل التام الا انه له الخيار في فسخه ما لم يقضه فالتماء المختلف بين العقد والقبض يكون للموقوف عليه و يطل بموqe بينهما — (شرح مفاتيح جناب ملا هادي صاحب صفحہ ۴۸۵ سطر ۳۱) *

1892

AGHA ALI

KHAN

"

ALTAU

HASAN

KHAN.

not to be compared in point of authoritativeness with the *Sharayi-ul-Islam* or the *Masalik-ul-Afham* (vide account of these works at pp. 171-173, Tagore Law Lecture for 1874 by Shama Charan Sircar). I therefore reject the authority of the text and prefer that of the *Sharayi-ul-Islam* and other works from which I have quoted.

Upon the question of acceptance by the *mutawalli* or beneficiary of the *waqf* the Pandit has cited two texts. One of them is the following:—

"A person in whose favour supervision has been stipulated is not bound to accept. If he accepts he will not be bound to supervise for ever, because it is similar to *taukil* (the appointing of an agent, in its significance. Where supervision becomes void it will be deemed as if supervision was not stipulated." (*Sharah Lamah* by *Shahid* II, p. 105, line 23).*

Similar is the effect of the other text (No. 14) from the *Masalik-ul-Afham* by *Shahid* II (p. 344), which, however, I need not quote because their simple effect is that the person appointed to supervise a *waqf* is under no legal obligation necessarily to accept the trust unless he wishes it, and also that after having once accepted it he is at liberty to resign. The texts cannot be understood to mean that delivery of possession and acceptance are not conditions precedent to the validity of a *waqf*.

I now pass on to the third point of the Pandit's argument, namely, that the death of the *waqif* before delivery of possession converts the *waqf* into a bequest which is to be enforced to the extent of one-third of the estate of the deceased. For this contention he relies upon the following text:—

"It is reported from Kafi by Abassalah that if a person make a charitable donation (*sadaqah*) for any of the said purposes and make witnesses upon himself in that respect, and die before delivery,

* ولا يجب على المشروط له القبول و لو قبل لم يجب عليه الاستمرار
لانه في معنى التوكيل وحيث يبطل النظر يصير كما لو لم يشترط — (كتاب
شرح لمعة شهيد ثاني صفحة ١٠٥ سطر ٢٨) *

then if the *sadaqah* is for a mosque or good purpose, it is enforceable. If it is in favor of a person, possession by whom or whose guardians is valid, then it is a bequest, and the provisions of bequest shall be applied to it. In *Al Morasim* Sallár has not at all mentioned possession amongst the conditions. All that will show the reasons for what is said in *Masálik*, *Riaz* and other books as to possession being unnecessary in *waqf*. So much so that the unanimity of opinion is reported from *Tankih*." (*Jawáhir-ul-Kalám* by Shaikh Muhammad Hasan Najfi, p. 488, lines 28-30.)*

The text plainly read relates to *sadaqah* (صدقة) or *alms*; but the Pandit has argued that it relates to *waqf* also, though the word does not occur in the text, and in support of this contention he has cited the following two texts:—

"In many traditions the word *sadaqah* has been used for *waqf*; nay, no word other than *sadaqah* has been reported in respect of the *waqfs* made by the Imáms, peace be with them." (*Jawáhir-ul-Kalám* by Shaikh Muhammad Hasan Najfi, p. 487, line 45.)†

"It is one of the *sadaqahs*. Similarly it is said in *Nihayat* and *Morasim* that a *waqf* and a *sadaqah* are one and the same. Perhaps this is the reason why the author of *Durus* has defined it as a 'perpetual *sadaqah*;' nay, even in *Masálik*, *Taskira*, *Mohazzab*-

* وعن كافي في الصلاح اذا تصدق علي احد الوجوه المذكورة
او شهد علي نفسه بذلك ومات قبل التسليم فان كانت الصدقة علي مسجد او
مصلحة فهي اماضية وان كانت علي من يصح قبضه او وليه فهي وصية يحكم
فيها احكام الوصايا وعن سائر في المراسم عدم ذكره من الشروط اصلا وبذلك
كله يظهر ان ما في مسالك والرياض وغيرها من المفرد غيبة عن اشراطه فيها
حقا فيما حكمي عن التفتيح من الاجماع علي ذلك — (كتاب جواهر الكلام جناب
شيخ محمد حسن صاحب نجفي، صفحة ٤٨٨ سطر ٢٨ لغاية ٣٠) *

† واطلاق الصدقة عليه في كثير من المقصود بل لم يذكر فيما ورد مما
او فقرة عليهم السلام الا بلفظ الصدقة — (كتاب جواهر الكلام جناب شيخ محمد
حسن صاحب نجفي، صفحة ٤٨٧ سطر ٤٥ يعني آخر سطر) *

1892

AGHA ALI
KHAN
v.
ALTAJ
HASAN
KHAN.

1892

AGHA ALI
KHAN
P.
ALTAF
HASAN
KHAN.

ul-barey and *Taukih* the learned have said that it means *sadaqah*." (*Jawāhir-ul-Kalām* p. 486, last line, and p. 487, first line.)*

Now in regard to these texts, whilst it may be conceded that the word *sadaqah* (صدقة) and its derivatives may be used under circumstances and conditions which would amount to a *wagf*, yet where such circumstances and conditions do not exist, its use will not constitute a *wagf*. This is clear from the text of the *Sharāyi-ul-Islām*, which I have already quoted, giving the definition and constitution of *wagf* (*vide* Baillie's *Imameea Law*, p. 211). Comparing that definition with the incidents of *sadaqah* (صدقة) or alms described in the *Sharāyi-ul-Islām* (*vide* Baillie's *Imameea Law*, p. 256) it seems clear that, among other distinctions, *wagf* has the effect of tying up the *corpus* or substance of a thing and leaving its usufruct free for being employed for the purposes of the *wagf* in perpetuity and subject to other conditions (*vide* Baillie's *Imameea Law*, p. 218) which are not applicable to *sadaqah* (صدقة) or alms. Indeed in *sadaqah* (صدقة) the *corpus* of the property itself is bestowed and perpetuity is not one of its conditions. I do not consider it necessary to dwell upon this subject beyond saying that *wagf* and *sadaqah* (صدقة) are separately treated in the authoritative law works, and that the nature of the two transactions being distinguishable in many incidents it would be erroneous to confound the rules relating to the one with the rules relating to the other. I will go further and say that, even if I could have accepted the interpretation which Pandit *Sunder Lal* has placed upon what is said in the text of the *Jawāhir-ul-Kalām* as to the *sadaqah* (صدقة) being applicable to *wagf* also, I would not have adopted it, as upon such interpretation the text will be opposed to the far higher authority of the *Sharāyi-ul-Islām* the *Masalik-ul-Afhām* and other works from which I have quoted in the early part of this judgment.

* وانه من الصدقات كما في النهاية محكي المراسم ان الوقف والصدقة
شيعي واحد ولعله قد عرفت في من بانه الصدقة التجارية بل في المسالك و
محكي المذكورة والمذهب البارع والتفصيل قال العلماء المراد به الصدقة —
(عذارت كتاب جواهر الكلام شيخ محمد حسن صاحب صفحہ ۳۸۶ سطر ۱۵۱۰
و سطر اول صفحہ ۳۸۷) *

The next class of texts which the learned Pandit has cited relates to gifts and *wāqf* or charitable donations made in death-illness (مرض الموت) : as an illustration of these texts the following may be quoted :--

"If a person made a gift or *wāqf* or charitable donation in his death-sickness, it is to be satisfied out of one-third, according to the better of the two opinions, excepting in the case of the heirs giving sanction. The same rule applies if he did so in good health and delayed possession till sickness." (*Sharah Lamah* by Shahid II, p. 108, lines 10 and 11).*

This text is authoritative and shows that gifts or *wāqf* made during death-illness (*marz-ul-maut*) (مرض الموت), which is a technical phrase of the Muhammadan law, are to be held valid to the extent of one-third, as described. But there is nothing in the text to justify the contention that a gift or *wāqf* made during death-illness becomes valid without all the incidents constituting it, such as delivery of possession. The text in using the words gift and *wāqf* means valid gifts and valid *wāqf*, both of which require delivery of possession to render them valid. The rule as to the *marz-ul-maut* (مرض الموت) affecting transfers relates not to transfers which are *ab initio* void, but to transactions which, being valid, are affected by the rule. In this very text which I am now considering the last part shows that the same rules apply to a gift or *wāqf* made in good health, but in which possession was not delivered till the transferor fell ill. The phrase *takhir-ul-qubz* (تأخير القبض) which has been rendered in the learned Pandit's translation by the words—"delayed possession till sickness," might have been more clearly rendered by the words—"the delivery of possession having been delayed till sickness." What I mean to explain is that the text *implies* that both in the case of gift or *wāqf* delivery of

1892

AGHA ALI
KHAN
v.
AITAF
HASAN
KHAN.

* ولو وهب او وقف او تصدق في مرض موته فهي من الثلث علي
اجود القولين الا ان يجيز الوارث ومثله مالو فعل ذلك في حالة الصحة و
تأخير القبض الي المرض — (كفات شرح لمعة شهيد ثاني صفحة ١٠٨

شطر ١٠ و ١١) *

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

possession *has taken place during death-illness*, and that it cannot be understood to mean that delivery of possession may be dispensed with altogether when such transfers are made during death-illness. Upon this point I may in passing refer by analogy to the ruling of this Court in *Musammât Labbi Beebee v. Musammât Bibbun Beebee* (1) which in dealing with the effect of *marz-ul-maut* (مرض الموت), or death-illness, upon gifts made, makes it clear that the will would have been void if no possession had been given at all during the illness of the donor. I may also perhaps refer to the case of *Yusuf Ali v. the Collector of Tippera* (2), where it was laid down that under the Muhammadan law a gift of property *in futuro*, that is, a gift made to take effect at any future definite period is not valid unless possession has been delivered. These are cases governed by the *Sunni* law, but upon this point as to the necessity of delivery of possession in gifts the *Sunni* law is in accord with the *Shia* law, as appears from the quotation which I have already made from the *Sharayi-ul-Islam*, namely the text which lays down that "if the donor should die after the contract and before possession has been taken of the gift it falls back into his inheritance." (*Vide* Baillie's *Imameea Law*, p. 204, also p. 203 as to definition and constitution of gift.)

For similar reasons the other texts which the Pandit has cited as to *wâqf* or gifts made in *marz-ul-maut* (مرض الموت) or death-illness does not go the length of supporting the learned Pandit's contention that such *wâqf* and in gifts are independent of delivery of possession as essential to their validity. I will quote the text and it runs as follows:—

"Where a person made a *wâqf* in his dangerous illness, and similarly where he made a *Sadqat-ul-tamlîk* (assignment of ownership by way of charity) a gift or a bequest, our masters have two reports in respect thereof. One of the two is that it is to be satisfied out of one-third, and this is the doctrine of the opposite sect (*Sunnis*). The other is that it takes effect immediately. Now if the first report be established, then if the beneficiary be an

(1) N.-W. P. H. Rep., 1874, p. 159.

(2) I. L. R., 9 Calc., 133.

heir the *waqf* shall at all events be binding as regards one-third (of the estate) among us while among the opposite sect (*Sunnis*) nothing is binding until the rest of the heirs give sanction, because they say,—‘verily there can be no bequest in favor of an heir.’ If the *waqf* be made in favor of a stranger, and it can be satisfied out of one-third the *waqf* is binding; but if it cannot be satisfied out of one-third, and the heirs sanction the excess, it shall be binding as regards the whole, and if they do not sanction that, it shall be binding to the extent of one-third, and ‘shall be void in respect of the excess.’” (*Mabsut* by *Sheikh Abu Jafar*, p. 273, lines 17-20.)*

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN

Now this text, whilst describing minor differences between the *Sunni* and the *Shia* law, contains nothing as to the dispensibility of delivery of possession in the case of *waqf* made during death-illness. The text, like the preceding one, in referring to *waqf*, gift or other transactions mentioned therein, implies that each one of those transactions has been completed according to the exigencies of the rule governing each. To put the matter shortly, neither of these texts can be understood to refer to invalid and incomplete transactions such as a *waqf* or gift would be under the *Shia* law without possession.

In support of the fourth part of his argument, namely, that a *waqf* or appropriation *in presentis* may be created and its operation may be lawfully suspended till the death of the *waqif* the learned Pandit has relied upon the following two texts:—

* اذا وقف في مرض الموت وكذلك صدقة التملك والهبة والوصية لا محابنا فيه روايتان اخديهما ان ذلك من الثلث وهو مذهب المخالفين والاخري ان ذلك منجز في الحال فاذا ثبت الاول فان كان الموقوف عليه وارثا عندنا لزم من الثلث علي كل حال وعند المخالف لا يلزم شيئي حتي يجيزوا باقي الورثة لقولهم انه لا وصية لوارث فان كان علي اجليي وخرج من الثلث لزم الوقف وان كان لا يخرج من ثلثه فان اجاز الورثة ما زاد علي الثلث لزم في الميعاد ان لم يجز ذلك لزم في قدر الثلث وبطل فيما زاد عليه (كتاب مبسوط شيخ ابو جعفر صفحة ٢٧٣)*

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

*“ Proposition.—*The necessary incident of a *waqf* in the opinion of all our doctors is immediate perpetuity, whether he did or did not postpone it after his death, and whether a judge did or did not pass a decree therefor.” (*Tazkirat-ul-Fukha*, by Allama Hilli, p. 439, lines 39 and 40.)*

“There is no difference between his fixing the time (of *tauliat*) in the life-time, and his making a will (therefor) in the matter of the stipulation and specification made by him becoming obligatory. If a person make no restriction in his making a *waqf* and do not make a provision for *tauliat* (governance of the trust) in favor of any one, it shall be deemed that the *waqif*, author of trust, is to supervise, because supervision and appropriation primarily rest with him, and since he did not withdraw them from himself, they remained where they were.” (*Tazkirat-ul-Fukha*, page 441, lines 27 and 28.)†

These two texts come from one and the same work, which is of lower dignity in point of authority than the *Sharay-i-ul-Islam* or the *Masalik-ul-Afham* and the other works which I have already cited. Those works require *tanjiz* (تنجيز) as explained by me and also delivery of possession as conditions precedent to the validity of a *waqf*, and I prefer their authority to the authority of these texts ; and I may add that the texts understood even in the sense in which Pandit *Sundar Lal* interprets them fall short of showing that delivery of possession is not a necessary condition for the validity of a *waqf* under the *Shia* law.

Among the other texts which he had cited two relate to the question how far the admission of a *waqif* as to his having delivered

* مسئله مقتضي الوقف بدوامه في الحال سواء اضافه الي ما بعد الموت اولا بقضه وسواء قضى به قاض اولا يقض منذ علمائنا اجمع

— کتاب تذکرۃ الفقهاء علامه حلی صفحه ۴۳۹ سطر ۳۹ و ۴۰ *

† ولا فرق بین ان یفرض فی الحیوة و بین ان یروسی فی رجوع العمل بما شرط و مینه و لو اطلق فی رقبه ولم یشتراط التولية لانهما احتمل ان یکون النظار

للاوقاف لان النظار للتصرف کان الیه فاذا لم یصرفه من نفسه یفی علی ما کان

علیه — (تذکرۃ الفقهاء علامه حلی صفحه ۴۴۱ سطر ۲۷ و ۲۸) *

possession of the *wagf* property is binding upon him. These texts are the following : —

“ *Proposition.*—If a person admit a gift and seisin together and say,—‘I made a gift to him and delivered possession,’ or,—‘I made it over to him,’ or,—‘he took it from me,’ he will be bound by the admission and judgment shall be given in respect thereof according to the purport thereof. So if he retracts and denies seisin no attention shall be paid to his denial, because it involves the falsification of his own statement ; although he may offer an explanation of his admission by saying,—‘I made the admission because my agent had informed me of his having delivered possession to the donee whereas he (the donee) had not got possession ’ or (by saying) ‘I did not remember.’ ” (*Taskirat-ul-Fukha* published at Tehran, p. 169, line 1.)*

“ *Question.*—A person wrote under his own hand that he made a valid and lawful *wagf* of his such-and-such house without mentioning the delivery of possession, which is a condition for the validity of the contract of *wagf* and for its being obligatory, and he caused witnesses to testify to the correctness of what he wrote. Is or is not that sufficient for the establishment of the *wagf* and for its being obligatory ?

Answer.—What appears from the jurists on gift, &c., is that an admission as to a gift, a *wagf* and anything similar to them in which delivery of possession is necessary, does not amount to an admission as to delivery of possession ; but what appears on making reference to the practice of the day, when attestation is probable, is that admission as to a *wagf* means a valid admission containing all the elements and fulfilling all the conditions. The same rule applies when the making of a gift, a *wagf* or the like

1892

AGHA ALI
KHAN
v
ALTAF
HASAN
KHAN.

* مسئله ولواقربا لهبة والقبض معا فقال رهبنه واقبضت واسلمته منه واخذته مني لزمه الاقرار وحكم عليه بمقتضاه فان ماوانكرالقبض لم يلقفت الي نكارة لاشتغالها علي تكذيب نفسه سواء ذكر لاقارة تاويلان يقول كان وكيلي اخبرني بانه اقبضه فاقررت به ولم يكن قد قبض اولم يذكر—(تذكرة الفقهاء علامه حلي
چهارم طهران ۱۶۹۱ سطر اول) *

1892
AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

becomes obligatory by new promise and other thing creating an obligation. Notwithstanding all that it is necessary in such questions to resort to the judge of final jurisdiction, and to lay the case before him, and not to content oneself with the mere dictum. God knows well." (*Zakhirat-ul-Ma'id* by Sheikh Zain-ul-Abidin Hujjat-ul-Islam, p. 651, lines 11—21.)*

It is not necessary to discuss these texts minutely, because whilst they distinctly affirm the principle as to the delivery of possession being necessary for validity of a *waqf* they lay down no rule of the substantive law of *waqf* but propound rules of adjective law or procedure relating to the effect of admissions, and when such admissions may be rebuttable, when irrebuttable, and when they may amount to an estoppel. These are matters which under the procedure of our Courts appertain to the province of the law of evidence which we have to administer according to the Indian Evidence Act (I of 1872). I go further and say that even if it were not so, there is nothing in these texts to warrant the contention that the mere fact of a person having written a deed such as Muhammad Ali's will of the 3rd of November 1863 (which is in question in this case) would debar his heirs from proving that the recitals of the deed to the effect that actual delivery of possession had already taken place by the act of the *waqif* to the *mutawalli*, namely, Muhammad

* سوال -- رجل كتب بخطه انه وقف داره الفلانية رقفاً صحيحاً شرعياً من دون تعرض لاقباض الذي هو شرط في صحة عقد الوقف و لزومه و اشهد علي صحة ما كتبه فهل يكفي ذلك في تبوت الوقف و لزومه ام لا (ج) -- الذي يظهر من الفقهاء في بحث الهبة و غيرها ان الاقرار بالهبة والوقف و نحوهما مما يشترط فيه الاقباض ليس اقرار بالاقباض و لكن الذي يظهر من المراجعة الي عوننا اليوم مقصداً الي قرينة الاشهاد ان الاقرار به منزل علي الصحيح المستجمع لاجزاء لمقيد لوجوه الشرط كما ان الزم بالنذر و العهد و سایر الملزمات ابصار الهبة و الوقف و نحوهما مع ذلك فاللزم في امثال هذه المسائل لرجوع الي احكام الحاسم و المرافعة مودة ولا يفتنع بمجود القنوي والله العالم -- (مبارت ذخيرة المعاد جناب شيخ زين العابدين صاحب حجة الاسلام صفحہ ۶۵۱ سطر

Taqi, were not true, and that as a matter of fact no possession was ever delivered to the *mutawalli*. Indeed, in regard to this matter there is upon the record a judgment of Mr. Sapta, District Judge of Cawnpur, dated the 20th of January 1866, which is mentioned in the referring order and which was the result of a litigation between the *mutawalli*, Muhammad Taqi, as plaintiff and Musammât Kanizak Fatima, daughter and sole heir of the deceased *wâqif*, Muhammad Ali, as defendant,— the object of the suit being to recover possession of the *wâqf* property, and the defence being that the *wâqf* was invalid and no delivery of possession had taken place and the *mutawalli* had declined to accept the trust. The suit was dismissed upon acceptance of the pleas in defence in that case, and it will no doubt be for the Division Bench which has to deal with this case to consider whether the District Judge's judgment of the 20th of January 1866 in the former case does not operate as *res judicata* in this case, and if so to what extent.

The remaining texts quoted by Pandit *Sundar Lal* have a bearing upon the third point referred to the Full Bench, namely whether the consent of the *wâqif's* (appropriator's) heirs to a testamentary *wâqf*, which was in itself invalid would validate such a *wâqf*. In reference to this point many texts have been cited, but of these I need take only two as specimens and quote them. These are the following :—

“The heir's sanction after death has weight. As to whether it is valid if given before death there are two opinions. The more celebrated of the two is, that it is binding on the heirs. When the sanction takes place after death it is one for the testator's act. It is not the commencement of a gift, and consequently the validity thereof does not depend upon seisin.” (*Sharâyi-ul-Islâm*, p. 209, lines 18 and 19.)*

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

* و اجازة الوارث تعينو بعد الوفاة و هل تصح قبل الوفاة فيه قولان
اشهرهما انها تلزم الوارث و اذا وقعت بعد الوفاة كان ذلك اجازة لفعل الموصي
و ليس ابتداء هبة فلا يفتقر صحتها الى قبض — (شرايع الاسلام ص ٢٠٩
سطر ١٨ و ١٩) *

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

"So if a person bequeath more than one-third and the heirs give sanction, the bequest is valid. If the heirs refuse to sanction it, it becomes void. If some of the heirs sanction it, the sanction will take effect to the extent of his share in the excess. If the heirs sanction a portion of the excess, the bequest will be valid in respect of that portion specifically. If a person make a will for the sale of his estate for the market value,* then there is doubt as to the sanction being necessary. Sanction is the enforcement of the testator's act and not the commencement of a grant. Therefore it does not require seisin, and the expressions,—‘I sanctioned,’ ‘I enforced,’—and the like are sufficient. So if a person emancipate a slave, who is the only property he has, or makes a will for the slave's manumission, and then the heirs give sanction, the right of *wala* is entirely for his residuary and not for that of the heir. There is no distinction between the testator being sick or in good health. Sanction takes effect if it takes place after (the testator's death) according to all and as to its taking effect before death, there are two opinions." (*Qawáid-ul-Ahkám* by Allama Hilli, p. 397, lines 5-11).†

In regard to these texts, it is enough to say that they do not deal with the point under consideration and are irrelevant. They relate to valid bequests and how far such bequests are enforceable when they exceed the recognised one-third share of the estate of the deceased by reason of the consent of the heirs. There is nothing in these texts or in the others which have been cited to show that

* The original literally means ‘value of the similar.’

† فلو اوصى بازيد من الثلث فجاز الورثة صحته و ان امتنعوا — بطلت ولو اجازة بعض الورثة نفذت الاجارة بقدر حصته من الزيادة ولو احاز — وبعض الزائد صح خاصة ولو اوصى ببذبح تركته بثمن المثل ففي اشترط الاجارة اشكال والاجارة تنفذ لفعل الموصي لا ابتداء مطية فلا يفتقر الي قبض فيكفي اجزت ونذرت وشبهه فلو اتمق بدال المال له سواه او اوصى بعنقه فجاز الورثة فالولاء كله لعصيته دون مطية الوارث ولا فوق ذلك ان يكون الموصي مريضاً او صحيحاً وينفذ الاجارة ان وقعت بعد الموت اجماً ما وفي نفوذها قهله قولان — (قواعد الاحكام ملامه حلي صفحه ٣٩٧ سطر ٥ لغايت ١١) *

wagfs which are void gifts, which have lapsed, and in which no possession was ever delivered by the deceased *wāqif* or donor are to be dealt with under these rules. I am of opinion that neither these texts nor the others which have been cited by Pandit *Sundar Lal* upon the effect of the consent of heirs to the will of the deceased testator have any relevancy to the present inquiry where the question relates, not to valid bequest, but to a *wagf* which, as I have already shown, must be regarded as void under the *Shia* law, not only by reason of non-delivery of possession by the *wāqif* to the *mutawalli*, but also by reason of the non-acceptance of the trust by the *mutawalli*.

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

It is not for the Full Bench to enter into the minute details of the will of Muhammad Ali of the 3rd of November 1863, nor the effect of the District Judge's judgment dated the 20th of January 1866 beyond what has been stated in the referring order, and I therefore refrain from entering into that discussion here in the Full Bench.

My answer to the first question referred to the Full Bench is in the *negative*, and to the second question my answer is in the *affirmative*. To the third question my answer is in the *negative*, because it is a principle, not only of Muhammadan jurisprudence, but of all civilized systems, of law, that a transaction which is void in itself cannot be validated by any subsequent act of the heirs of a deceased person. If they wish to give effect to an invalid transaction themselves they can of course do so by a valid transaction of their own; but no consent by them can validate a transaction of their predecessor in title which was void in law and never took effect.

With these answers to the three questions referred to the Full Bench I would return the case to the Division Bench for disposal upon the other points which arise in this case.

EDGE, C. J.—I have had an opportunity of reading and considering the judgment which my brother Mamood has just delivered. I entirely agree with it and have nothing further to add.

KNOX, J.—I concur with my brother Mahmood in considering that the replies which should be returned to the questions referred

1892
AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

to us are:—(1) that a *waqf-bil-wasiyat* is not valid under the Muhammadan law of the *Shia* school in the absence of actual delivery by the *waqif* himself of possession of the appropriated property to the *mutawalli* or person appointed as superintendent thereof by the deed by which the *waqf* is created; (2) that the death of the *waqif* before actual delivery of possession by him to the *mutawalli* or beneficiaries of the trust does invalidate the *waqf* so as to render it null and void *ab initio* under the *Shia* law; and (3) that the consent of the appropriator's heirs to such testamentary *waqf* under the conditions just noticed cannot validate such a *waqf*.

The various texts which have been cited during the hearing of this reference have been so exhaustively treated by my brother Mahmood, that, although I had considered them carefully and satisfied myself as to the construction which should be placed upon the more important of them, I shall content myself with saying that the constructions which I was prepared to place on those texts coincide with those at which my brother Mahmood has independently arrived. I am fully satisfied that, whatever may be the *Sunni* doctrine as to the essence, nature and incidents of *waqf*, the *Shia* school regards the transaction as a contract and as subject to the incidents which that law imposes on a contract. The author of the *Jawâhir-ul-kâlam* in the passage beginning,—“ولا يلزم عقد الوفاء لابقاض” brings this point out very clearly, and the learned counsel who appeared for the appellant himself had no hesitation in admitting that this work was a work of undoubted authority. The passage cited from p. 332, Teheran edition, of the *Jâmi-ul-Shâtat* also speaks with no uncertain voice so far as this question is concerned.

I was at first much pressed by a difficulty raised by the learned Pandit and based on the portion of this extract beginning,—“اما اشتراط قبول” as showing that instances must occur, and occur frequently, in which there could be no acceptance by the beneficiaries of the *waqf*, and where either the doctrine that every *waqf* was of the nature of a contract, or else the *waqf* itself must fail; but as, my brother Mahmood has pointed out, the passage becomes quite clear and consistent when compared with what has been

written by the author of the *Durûs* on the same point in the passage beginning-- “ رابعها القبول المتقارن الخ ”

I will only now comment briefly on two other arguments addressed to us by Pandit *Sundar Lal* for which at first there seemed to be some foundation of authority, and which would, if correct, militate against the doctrine noticed above. The learned Pandit contended at the commencement of his argument that a legal *waqf* could be constituted under the *Shia* law and operation made to depend on the occurrence of an event in the future if that event were quite certain and positive. This view seems to have found favour with the learned author of the *Tegor Law Lectures* for 1884; but after careful research no sound authority for this view was adduced, at any rate from the *Shurâyi-ul-Islâm*, in fact all the texts of higher authority say that immediate operation must be given by the *wâqif*, or appropriator of a *wâqf*; to the *waqf*. The difficulty also which the same learned counsel raised and founded upon the passage from the *Jawâhir-ul-Kalâm* beginning--“ بان يقرل هو وقف بعد وفاتي ” has been well met by Mr. *Karamat Husain* in the distinction which he drew in his argument between a *wasiyat bil-waqf* and a *waqf-bil-wasiyat*.

Once the doctrine that according the *Shia* law *waqf* is a contract is accepted, and of this I have now no doubt left, the answers to the questions referred to us become clear, and can only in my opinion be the answers which at the commencement of this judgment I proposed to give. The reasoning for each step has been so clearly and exhaustively given by my learned brother that it is needless for me to say anything further.

The case was then remitted to the Division Bench for disposal.

1892

AGHA ALI
KHAN
v.
ALTAF
HASAN
KHAN.

APPELLATE CIVIL.

Before Mr. Justice Tyrrell and Mr. Justice Knox.

1892
May 2.

LAL BAHADUR SINGH (PLAINTIFF) v. SISPAL SINGH AND OTHERS
(DEFENDANTS).*

Joint Hindu family—Partition to detriment of minor—Suit by minor on attaining majority to recover his full share—Limitation—Act—XV of 1877, sch. ii, Arts. 95 and 96.

Certain members of a joint Hindu family partitioned the family property among them in such a way as to give one member of the family who at time of the partition was a minor, less than the share to which he was entitled. The minor was represented in the partition by his uncle, though the uncle was not the natural guardian of the minor, nor in any other way entitled to deal with the minor's property. The minor on attaining majority brought a suit for recovery of the full share to which he was entitled. *Held* that this was not a suit for relief on the ground of fraud or mistake, inasmuch as the partition could not under the circumstances affect in any way the rights of the minor. The suit was therefore not subject to the limitation of three years prescribed by Arts. 95 and 96 of the second schedule of Act No. XV of 1877.

THE facts of this case sufficiently appear from the Judgment of the Court.

The Hon'ble Mr. *Spankie* and Pandit *Sunadr Lal*, for the appellant.

Munshi *Kashi Prasad* for the respondents.

TYRRELL and KNOX, JJ.—This was an action brought by a member of a Hindu family for a declaration of his title one quarter of the ancestral estate and to obtain possession of the same by partition. The defendants are the cousins of the plaintiff and his uncle, who during the plaintiff's minority divided the estate between them in the year 1877. The plaintiff and the seventh defendant are descendants of Saran Singh, who was entitled to one moiety of the whole estate; the defendants one to six being the sons of Saran Singh's brother, and, as such, entitled to the other moiety. But in the transaction of 1877 an arrangement was made between the plaintiff's uncle on the one hand and the defendants one to six

* First Appeal No. 215 of 1889 from a decree of Pandit Bansidhar Subordinate Judge of Ghazipur, dated the 12th August 1889.

892

LAL
BAHADUR
SINGH
v.
SISPAL
SINGH.

on the other under which such estate was divided between them, the former getting $\frac{2}{3}$, the latter $\frac{1}{3}$ only. It may be taken, though the evidence on the point is slender, that the plaintiff was 14 years old or thereabouts when his father, Gajadhar Singh, died in 1877. He was therefore *sui juris* in 1881 or 1882. In 1884 he brought a suit in *forma pauperis* to get the relief he now seeks. The suit was one which obviously must fail, and he withdrew it. He brought the present suit in May 1887, being then aged about 24 years. He pleaded that he was not bound by his uncle's act in 1877; that his uncle had no authority as his natural guardian or otherwise to dispose of his title to the estate; that his uncle's acts, even if they professed to have been done on the plaintiff's behalf in 1877, were not and could not be a bar to the present suit, nor could they of themselves convey to the defendants one to six a good title to a part of the plaintiff's rights and interests in the ancestral estate under the Hindu law. The learned Counsel for the plaintiff referred to the law on the subject as laid down in *Durga Persad v. Kesho Persad Singh* (1) and *Khem Karan v. Har Dayal* (2) and contended with force that, except under some express authority of law. Rup Narain Singh, defendant No. 7, was incompetent to make any valid disposal of his nephew's estate during his minority. We have read the learned Subordinate Judge's judgment, and it seems to us that his reasons for taking the contrary view are unsound. The learned vakil who supported the decree below urged that the suit is barred by the three years' limitation of Arts. 95 and 96 of sch. ii of Act No. XV of 1877 and he cited *Natha Singh v. Jodha Singh* (3) and *Bajji Krishna v. Pirchand Budharam* (4) in support of his contention. Those rulings do not apply to the facts before us. We have no hesitation in agreeing with the Court below on this issue. Upon this the learned vakil intimated his assent to an order remanding the case for trial upon the merits under s. 562 of the Code of Civil Procedure on the basis of the preliminary finding of law that the plaintiff is not bound in law by the arrangement made by the seventh defendant and his

(1) I. L. R., 8 Cal., 656.

(3) I. L. R., 6 All., 403.

(2) I. L. R., 4 All., 37.

(4) I. L. R., 13 Bom., 221.

1892

LAL
BAHADUR
SINGH
v.
SIRPAL
SINGH.

uncle in 1877 with the other defendants, of by the subsequent proceedings connected with the alleged arbitration award.

Setting aside the decree below, we order accordingly, costs heretofore being costs in the cause.

Cause remanded.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Blair.

1892
May 3.

NAIAZ BEGAM (OPPOSITE PARTY) v. ABDUL KARIM KHAN AND
ANOTHER (APPLICANTS) *

Act XIX of 1873, ss. 113 and 114—Partition, application for—Order on objection as to title raised in course of partition proceedings “Order” or “decision,”—Appeal.

A Collector or Assistant Collector trying a question of title raised in the course of the hearing of an application for partition under the N.-W. P. Land Revenue Act (Act No. XIX of 1873) is not bound to cause a formal decree to be drawn up embodying the result of his order of decision on such point. An appeal will lie from the “order” or “decision” of such Collector or Assistant Collector.

In this case the respondents Abdul Karim Khan and Ibrahim Khan applied under s. 109 of Act No. XIX of 1873 to the Assistant Collector of Moradabad for perfect partition of a certain specified area of land. To this application Musammat Niaz Begam, the appellant, filed an objection to the effect that a certain mango grove comprised in the land to which the above-mentioned application for partition referred was her exclusive property, and prayed that it might be exempted from partition. To this objection the respondents replied by a counter-application denying the title of the appellant to the grove claimed by her. The Assistant Collector tried the question of title and disallowed Musammat Niaz Begam's objection. Musammat Niaz Begam then appealed to the District Judge, who dismissed her appeal on the merits. She then appealed to the High Court and the appeal coming before Mahamood, J., was referred by him to a Bench of two Judges.

Munshi *Kashi Prasad*, for the appellant.

Pandit *Sunar Lal*, for the respondent.

* Second appeal No. 76 of 1890, from a decree of H. F. Evans, Esq., District Judge of Jhānsi, dated the 23rd November 1889, confirming a decree of Maulvi Muhammad Fazal Azim, Assistant Collector of Moradabad, dated the 9th August 1889.

1892

NIAZ BEGAM

v.

ABDUL
KARIM
KHAN.

EDGE, C.J., and BLAIR, J.—This appeal arose out of a proceeding for the partition of a *mahāl*. The appellant here filed objections raising a question of title. The Assistant Collector framed an issue on the point; took evidence and proceeded during the trial in accordance with the Code of Civil Procedure. He likewise recorded in accordance with s. 113 of Act XIX of 1873 a proceeding declaring “the nature, extent, &c., of the interests of the parties, &c.” He rejected the objection finding that the objector, appellant, had failed to make out title, and passed an order disallowing the objection. The objector appealed to the Court below, and her appeal was dismissed. She has brought this second appeal. It has been contended on the authority of the decision in *Ranjit Singh v. Itahi Baksh*(1) that there should have been a formal decree drawn up by the Assistant Collector. In our opinion the third class of s. 113 must be read as it actually is, and it enacts merely, so far as this point is concerned, that the procedure to be observed by the Collector of the District or Assistant Collector in trying such cases shall be that laid down in the Code of Civil Procedure for the trial of original suits. The important words in that section are “trying” and “trial.” There is not apparently anything in the section to show that a formal decree, as apart from the “proceeding” of s. 113 and the “orders” and “decisions” of s. 114, should be prepared, and it is to be observed that s. 114, which gives the statutory right of appeal, gives it from the “orders” and “decisions” which are to be, held to be the decisions of a Court of Civil Judicature of the first instance. We have here the proceeding, the order and the decision of the Assistant Collector, which seems to be all that is required by the Act. In any case, the appellant would be in a difficulty. If a decree, as distinct from an order and decision, is necessary, then the appeal below was not brought from such a decree, for no such decree was drawn up, and the appeal, if it was from the decision, as we must take it to have been, of the Assistant Collector, could not have succeeded, as the “decision” could not in itself be wrong merely by reason of the fact that the decree subsequently to be drawn up was not drawn up. The appellant

(1) I. L. R., 5 All., 520.

1892 has failed to make out her first point. Her second point is that
 NIAZ BEGAM some witnesses on her behalf were not summoned. The answer
 v. to that is that she did not pay the *talbana* along with her applica-
 ABDUL tion, or at all. The appeal is dismissed with costs.
 KARIM
 KHAN.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

QUEEN-EMPRESS v. MULUA AND OTHERS.

1892
 May 6.

Criminal Procedure Code, ss. 233, 234, 537, 338, 339—Separate offences, effect of trial of in the same proceeding—Evidence, admissibility of—Pardon, withdrawal of—Trial of person whose pardon has been withdrawal.

In a Criminal trial evidence otherwise admissible is not rendered inadmissible by the fact that it discloses the commission of an offence other than that in respect of which the trial is being held. *Reg. v. Briggs* (1) referred to.

An accused person to whom a tender of pardon has been made, and who has given evidence under that pardon against persons who were co-accused with him, should not, if such pardon is withdrawn, be put back into the dock and tried as if he had never received a tender of pardon, but his trial should be separate from and subsequent to that of the persons co-accused with him.

Where four accused were at one and the same trial tried for offences of murder and robbery committed in the course of one transaction and for another robbery committed two or three hours previously and at a place close to the scene of the robbery and murder:—*Held* that the trial of these separate offences together, though an error or irregularity within the meaning of s. 537 of the Code of Criminal Procedure, would not necessarily render the whole trial void.

The facts of this case sufficiently appear from the judgment of the Court.

Mr. C. C. Dillon, for the appellants.

The Public Prosecutor (the Hon'ble Mr. Spankie), for the Crown.

EDGE, O. J., and BLAIR, J.—Mulua, Kamraj, Binda, and Suraj Pal have been convicted under s. 302 of the Indian Penal Code and have been respectively sentenced to death. They have also been convicted of two charges under s. 392 of that Code and have

(1) 2 M. and R. 199.

been formally sentenced respectively to seven years' rigorous imprisonment on each charge.

Mr. *Dillon* has appeared for the appellants, and, in addition to contending that they ought not to have been convicted on the evidence, he has raised some objections as to the validity of the proceedings and convictions in the Sessions Court.

The murder was committed, roughly speaking, at about a quarter past 8 o'clock on the night of the 19th of November 1891, on a road leading from Batésar fair. A party consisting of women and their attendants were attacked by four men with the object of robbery. Whilst the robbery was being carried out, a chaukidar, attracted by the noise, ran up shouting—"Take care, I am coming." Upon that, according to the evidence for the prosecution, the four men who were engaged in the robbery ran at the chaukidar and each of them hit him with a *lathi*. The chaukidar died from fractures of the skull, with caused effusion of blood upon the brain. There can be no doubt that his death was caused by *lathi* blows inflicted by the men, or some of them, who were engaged in the robbery of Musammat Bijan's party. Of that robbery and that murder these four appellants have been convicted. Now there was a robbery committed between 5 and 6 o'clock that evening on the same road at a place from 3 to 3½ miles distant from the scene of the murder. These four appellants were at the same trial charged with, tried for, convicted of, and sentenced for the robbery committed between 5 and 6 o'clock.

The first point taken by Mr. *Dillon* was that it was illegal for the Sessions Judge to try the case of the first robbery along with the case of subsequent robbery and murder. In our opinion there can be no doubt that the robbery which took place first, was, within the meaning of s. 233 of the Code of Criminal Procedure, 1882, a distinct offence from the offence of murder which was committed in the perpetration of the second robbery. The first robbery and the murder were not offences of the same kind within the meaning of s. 234 of the Code, and in our opinion, in cases of so serious a nature as that of murder, offences not immediately connected with the murder ought not, for the purposes of charge

1892

QUEEN-
EMPRESS
v.
MULGA.

1892

QUEEN-
EMPEROR
v.
MULUA.

and trial, to be dealt with together. Now the question is whether the procedure involved more than an irregularity within the meaning of s. 537 of the Code. We are of opinion that the trial of the first robbery and the subsequent murder together was an error or irregularity within the meaning of s. 537 of the Code, and was not illegal in the sense which would make the whole trial void. Still that error or irregularity would make it necessary for us to set aside the proceedings in the trial below and order a new trial unless we were satisfied that the error or irregularity had not occasioned a failure of justice. Giving a wide meaning to "failure of justice," and adopting for the purposes of this case only the contention that Mr. *Dillon* urges that a failure of justice would have been occasioned if his clients were prejudiced by the charge for the first robbery and the charge for the murder being tried at the same trial, it is necessary to see in what respect these persons could have been prejudiced. Mr. *Dillon* contends that they were prejudiced, arguing that the evidence as to the first robbery which was given in support of that charge was not admissible in support of the charge relating to the second robbery and the murder. If that contention is sustainable, no doubt these men have been prejudiced in their trial, but in our opinion that contention is based upon a misconception of the law of evidence. Of the four men who were tried and convicted, Mulua had confessed fully to the robberies and the murder. The confession he made before the Magistrate. He also pleaded guilty at the Sessions trial. The other three men in their statements before the committing Magistrate had alleged *alibis* and had named witnesses to be summoned on their behalf to prove those *alibis* at the Sessions trial; so that it was manifest that the main contention at the Sessions trial would, so far as the three men other than Mulua were concerned, be one of identity. It was consequently material and relevant to show that these men were on that Batésar road on the night in question, and not beyond the Chambal or elsewhere as their indicated *alibis* would suggest. Now, it is quite clear that on the question of identity and also on the question of whether or not on that night within two or three hours before the murder, they were at

1892

 QUEEN-
EMPERESS
v.
MULUA.

a place sufficiently near the scene of the murder as not to preclude the possibility that they took part in the murder, evidence was admissible to show that between 5-30 and 6 o'clock that evening these men were together on the Batésar road and at the place where in fact the first robbery occurred. The only question can be as to whether evidence of what they were doing at that particular place was admissible or not. In our opinion it was clearly admissible. It went to show the opportunities which the persons who spoke to the accused having taken part in the first robbery had of identifying the persons who took part in that robbery with the men in the dock at the trial. Evidence of this kind would be clearly admissible in England. Many years ago Baron Alderson, who was one of the most careful Judges on the English Bench in his time, admitted for the purposes of identification evidence to prove that the person whom he was trying for robbery had on the same night committed a different robbery on a different person in the neighbourhood. That was in the case of *Regina v. Briggs* (1). It has been established in England by a long course of decisions, of which the common sense and propriety cannot be doubted, that evidence otherwise admissible cannot be excluded at a trial merely on the ground that that evidence shows that the prisoner against whom it is given has committed some other offence with which he was not charged at the trial. To confine the evidence as to the presence of those men at the scene of the first robbery to mere evidence that they were there and to exclude the circumstances under which attention was drawn to them would be to emasculate the evidence and to leave the Judge or the Jury or the Assessors without an opportunity of forming a judgment as to whether the witnesses who spoke to such identity had good opportunities of observing the persons whom they were identifying. We are, consequently, of opinion that, even if these appellants had not at this trial been tried for the first robbery, the evidence which was produced to show that they had taken part in it would have been extremely relevant and admissible on the question of identity which had to be determined in the trial for murder. Holding this view of the law and the facts we are of opinion that the

(1) 2 M. and R. 199.

1892

QUEEN-
EMPRESS
v.
MULUA.

error or irregularity in trying these appellants for the first robbery and for the second robbery and murder in the same trial did not occasion a failure of justice and did not prejudice the appellants to any greater extent than an accused may be said to be prejudiced by evidence as to his identity being rendered more conclusive, which could not be said to be a failure of justice. That disposes of the first point taken by Mr. *Dillon*.

The second point was that there were two Assessors, and that the record of the trial before us contains only a record of the opinions of one of those two Assessors. The learned Sessions Judge states distinctly in his judgment that the Assessors unanimously convicted on all three counts. We are quite certain that he would not have made that statement in his judgment unless he had obtained from them their opinions and unless they had expressed their opinions that the prisoners before them were guilty of all three charges. How it is that the record of the trial contains the record of the opinion of one Assessor only we are unable to say, and as the learned Sessions Judge is on leave there is no immediate opportunity of clearing up the subject. If he did not record the opinion of the second Assessor, he committed an error, an omission and an irregularity within the meaning of s. 537 of the Code of Criminal Procedure, but it has not occasioned, in our opinion, a failure of justice.

The third point is that Mulua was tendered a pardon under s. 338 of the Code of Criminal Procedure. He had at the Sessions trial already pleaded guilty to all the charges, and two witnesses had been examined when the Sessions Judge made a tender of the pardon under s. 338. The pardon tendered was a pardon in respect of all the three charges, namely, the two charges of robbery and the charge of murder. Mulua was put into the witness-box and examined as a witness on the faith of the pardon tendered to him, and he gave his evidence. At the conclusion of that evidence the Sessions Judge formed the opinion that Mulua's evidence as to the second robbery and the murder was untrue. He came to that conclusion without having heard any witnesses, in the case, except the

first two witnesses called. Those witnesses proved nothing to show that Mulua's evidence at the trial was false evidence. The Sessions Judge had before him, no doubt, the confession made by Mulua before the Magistrate, and he had probably also looked at the depositions taken by the committing Magistrate, and he had further on the Magistrate's record the deposition of the Civil Surgeon. The Sessions Judge being of opinion that Mulua's evidence as to the second robbery and the murder was false evidence, revoked the tender of pardon and put Mulua back from the witness-box into the dock and proceeded with the trial as against him and the other three accused. Whether or not that proceeding was illegal, it is quite clear to our minds that it might most seriously prejudice the defence of a man who was taken out of the dock in the middle of a trial to give evidence upon a tender of pardon, to put him back into the dock after his evidence had been taken and to proceed to try him as if the tender had never been made. It would be most difficult for a man placed in such circumstances to deal with the evidence or to defend himself and put forward any points which might be in his favour with any effect. It is very doubtful to our minds whether Mulua having given true evidence with respect to the charge relating to the first robbery was not entitled to the benefit of the pardon with respect to that charge. That charge as a criminal charge was quite distinct from the charges as to which the Sessions Judge considered Mulua's evidence to be false. In our opinion, where a man has given evidence upon a tender of pardon, and where that evidence has been false evidence or evidence in which he has wilfully concealed something essential, he ought not to be put back into the dock at once and tried, but the trial against him on the original charge ought to be a subsequent proceeding. Section 339 is not very clear in its wording, but it says that such person "may be tried for the offence in respect of which the pardon was so tendered, &c.," and that rather points, in our opinion, to the trial of such person not being merely a continuation of the trial at which he gave the false evidence, but a trial, so far as he is concerned, *de novo*. We have had great difficulty in making up our minds as to what would be the proper course to take with regard

1892

QUEEN-
EMPRESS
o
MULUA.

1892

QUEEN-
EMPRESS
v.
MULUA.

to Mulua, and we think that there being a doubt as to the legality of the procedure adopted with regard to him we should act on that doubt and set aside the convictions and sentences in his case and direct him to be retried in the Court of the Sessions Judge according to law. The Sessions Judge, should Mulua plead his tender of pardon as an answer to the charge relating to the first robbery, will have carefully to consider such plea. The convictions and sentences relating to Mulua are accordingly set aside, and he is directed to be retried. As to the other men, they are proved by evidence which leaves no doubt in our mind to have been present on the road that night on the occasion of the first robbery, and to have taken part in it, and to have been present at and to have taken part in the second robbery. We believe the evidence for the prosecution that Kamraj, Binda and Suraj Pal did strike the chaulkidar with their *lathis*, and that they were active participators in the murder. We say nothing as to whether Mulua took a part in that murder or not, as he will have to be retried; but it must not be assumed, from our refusing to express an opinion as to the witnesses against Mulua, that we doubt the correctness of their evidence. Those men who killed the chaulkidar were engaged in the commission of a very serious offence *viz*, the offence of robbery. He was acting in the execution of his duty when he ran up, and they turned on him and brutally murdered him. In the opinion which we have formed, we have not used the confession of Mulua before the Magistrate or his evidence at the Sessions trial against any of these three men, indeed his evidence at the Sessions trial would not appear to have been admissible against them, because, as we infer from the record, the tender of the pardon was withdrawn and he was put into the dock as a prisoner before the other accused had had an opportunity of cross-examining him. We have, however, been asked by Mr. Dillon to consider Mulua's evidence relating to the murder so far as it is in favour of Binda and Kamraj. No doubt Mulua did put the whole murder, so to speak, upon the shoulders of Suraj Pal, but we prefer to follow the evidence of the other witnesses in the case which shows that Binda, Kamraj and Suraj Pal all took an active part in the murder. The evidence for the defence

proves nothing so far as Binda, Kamraj and Suraj Pal are concerned. 1892

We dismiss the appeals of Binda, Kamraj and Suraj Pal, and we confirm in each case the conviction of murder and the sentence of death, and we direct that in each case the death sentence be carried out.

QUEEN-
EMPRESS
v.
MULUA

Appeals dismissed.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

JHINKA (DEFENDANT) v. BALDEO SAHAI (PLAINTIFF)*

1892
May 11.

Mortgage—Suit for sale by mortgagee against auction purchaser, mortgagee having accepted part of the proceeds of the former sale—Act VIII of 1859, s. 271—Estoppel.

On the 10th of February 1872, one S. R. mortgaged to the plaintiff an undefined one biswa share out of three biswas owned by him. On the 20th of March 1877, J. P. and G. P. brought to sale in execution of money decrees against S. R. two out of those three biswas, which two biswas were purchased by the defendant. The sale was confirmed on the 23rd of April 1877. Out of the proceeds of that sale Rs. 1,464-14-9 were appropriated by the plaintiff in part satisfaction of his mortgage. On the 16th of April 1877, the plaintiff sued the auction purchaser for sale of one biswa in satisfaction of his mortgage. *Held* that even if it could be shown (which it could not) that the particular biswa mortgaged to the plaintiff was one of those which had passed into the defendant's possession, the plaintiff was estopped by his previous conduct from suing to bring it to sale under his mortgage.

THE facts of this case sufficiently appear from the Judgment of the Court.

Mr. *Amir-ud-din*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondent.

EDGE, C. J. and BLAIR, J.—This case is a simple one. The suit is for a declaration that a one biswa share purchased by the defendant, Musammat Jhinka, at an auction sale under a decree in 1877 is liable to be brought to sale and sold under a mortgage held by

* Second Appeal No. 185 of 1890, from a decree of Maulvi Abdul Qaiyum Khan, Subordinate Judge of Bareilly, dated the 30th October 1889, confirming a decree of Babu Madhub Chunder Banerji, Munsif of Bareilly, dated the 17th April 1889.

1892

JHINKA
v.
BALDEO
SAHAI.

the plaintiff. The plaintiff got a decree on his mortgage and sought to bring this share to sale. The defendant Musammat Jhinka, who is the appellant in this appeal, filed objections, and her objections were allowed; hence this suit. One Sita Ram, who was a defendant to the suit, but is not a party to the appeal, was the owner of three biswa shares. On the 10th of February 1872, he mortgaged one biswa share without defining it or indicating it in any way to the plaintiff. On that mortgage the plaintiff brought a suit on the 16th of April 1877, and obtained a decree on the 10th of May 1877. It was a decree for enforcement of his lien. The decree was a indefinite as the mortgage as to the biswa share against which it might be enforced. Now, one Jwala Prasad and one Ganga Prasad obtained each of them a decree, each decree being apparently a money-decree, against Sita Ram. These decrees were put into execution and two biswas out of the three biswas of Sita Ram were sold at auction sale under these decrees and purchased by the defendant-appellant for Rs. 2,475. That sale took place on the 20th of March 1877. It was confirmed on the 23rd of April 1877. The proceeds of that sale were applied in the first instance to discharging the moneys due to the decree-holders under whose decrees the two biswas were sold, and the balance was applied in this way; part of it in payment to one Shib Dat, an execution creditor, and Rs. 1,464-14-9 in payment on the 13th of June 1877 to the plaintiff. The two biswas which were sold to the defendant-appellant at the auction sale of the 20th of March 1877 were specifically ear-marked and there can be no doubt as to their identity. The plaintiff now seeks to bring to sale one of those two biswas in execution of his decree, in default of his demand for Rs. 650 and costs being satisfied. The question is whether the biswa in suit is the biswa mortgaged to the plaintiff on the 10th of February 1872. The late Subordinate Judge of Bareilly found that it was. He arrived at that conclusion from a consideration of certain transactions to which the defendant here was no party. He came to the conclusion that the biswa in question was the biswa mortgaged to the plaintiff, because under another mortgage one biswa of the three biswas was mortgaged to Bansidhar. The mortgage in each case was absolutely indefinite in the sense that it did not define or

specify the biswa. The biswa in suit might just as well, from anything that can be inferred from that evidence, have been the biswa mortgaged to Bansidhar as the biswa mortgaged to the plaintiff; but, indeed, it appears to us that it was not open to the plaintiff to allege that the biswa in suit was the biswa which was mortgaged to him. At the time when the plaintiff received out of the proceeds of the sale to the defendant the Rs. 1,464-14-9 Act No. VIII of 1859 was in force. S. 271 of that Act is the section which must be applied to this case. The Munsif apparently thought that s. 295 of the present Code of Civil Procedure was the section which was to be regarded in ascertaining what where the rights of the parties. He did not pay attention to the date of the transaction in 1877. Now it appears to us that if in 1877 the plaintiff desired to assume the position that either of the two biswas sold to the defendant was sold subject to his mortgage, he was not entitled to obtain from the Court of payment to him of any portion of the proceeds of the sale. That section provides for distribution of sale proceeds, and it contains this proviso:—"When any property is sold subject to a mortgage the mortgagee shall not be entitled to share in any surplus arising from such sale." As the law stood then that was an equitable and just provision, and undoubtedly it was intended to prevent the occurrence of such a case as this; if indeed the plaintiff's mortgage covered either of the biswas sold. Here the plaintiff in 1877 went into Court and claimed the surplus of the proceeds of the sale of the two biswas, and, having got the surplus of the sale into his pocket, he now turns round says that the defendant whose money has been lying in the plaintiff's pocket all these years obtained nothing against him, and that he, the plaintiff, was entitled to bring this property to sale in discharge of his mortgage, so that he would get part payment of the mortgage debt out of the innocent defendant, and if his case be correct, he would the next day be entitled to sell in satisfaction of his mortgage the property which the defendant had paid for the day before. In our opinion the plaintiff, having taken Rs. 1,464-14-9 on the 13th of June 1877, is not now entitled to say that either of the biswas thus sold was the one undefined and unear-marked biswa mortgaged to

1892

JHINKA
v.
BALDEO
SAHAI.
•

1892 him in 1872. Ss. 270 and 271 of Act No VIII of 1859 were not as wide or as carefully drafted as is s. 295 of the present Act. The plaintiff's suit ought to have been dismissed on two grounds, that he was estopped from alleging that the biswa in suit was the biswa mortgaged to him, and that even if there had been no estoppel he had failed to establish the identity of the two biswas. The suit as against Musammat Jhinka will stand dismissed with costs in all Courts, this appeal being allowed.

Appeal decreed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

1892 MOHAN LAL AND ANOTHER (DEFENDANTS) v. BILASO (PLAINTIFF).
May 16. *Civil Procedure Code, s. 43 - Splitting remedies - Suit for declaration of title and for possession - Subsequent suit for possession.*

Where a previous suit for a declaration of title to immoveable property has been dismissed on the ground that the plaintiff was not in possession at the time of filing the suit, a subsequent suit on the same title for recovery of possession of the land is not barred under s. 43 of the Code of Civil Procedure. *Jibunti Nath Khan v. Shib Nath Chuckerbutty* (1) followed.

THE facts of this case are as follows:—On the 13th of September 1878 one Dodraj made a disposition of his property by way of a deed of gift, or deed of partition, in favour of his daughter-in-law, the plaintiff, Musammat Bilaso, and of Mohan Lal, his grandson, and Vidya Ram, his great-grandson, who were defendants in the suit. Under this deed the plaintiff became entitled to a share in certain property known as the “White Mahal” of mauza Barkhera, and certain other land known as “Talayawali” land. On the 8th of September 1888, the plaintiff instituted a suit in the Court of the Subordinate Judge in which she claimed a declaration of her rights in respect of mauza Barkhera, but that suit was dismissed on the ground that her possession over the land in question was not proved. On the 5th of March 1889 the plaintiff instituted a second suit, on this occasion for partition and separate possession of her share in mauza Barkhera and also in the “Talayawali” land. The suit was resisted

* Second Appeal. No. 223 of 1890, from a decree of T. R. Hedfern, Esq., District Judge of Bareilly, dated the 27th November 1889, confirming a decree of Maulvi Abdul Qaiyam, Khan, Subordinate Judge of Bareilly, dated the 12th June 1889.

(1) I. L. R., 8 Calc., 819.

by the defendants, the grandson and great-grandson of the donor, on the ground, amongst others, that the claim was barred by s. 43 of the Code of Civil Procedure. They also impugned the validity of the deed of gift upon which the claim was based. The Subordinate Judge decreed the plaintiff's claim in full. The defendants then appealed to the District Judge, who agreeing with the lower Court that the deed of gift was proved, and that there was no bar to the suit by reason of s. 43 of the Code of Civil Procedure, dismissed the appeal. The defendants thereupon appealed to the High Court.

Mr. *D. Banerji* and Babu *Jogindra Nath Chaudhri*, for the appellants.

Mr. *Roshan Lal*, for the respondent.

EDGE, C. J., and BLAIR, J.—The short question is whether s. 43 of the Code of Civil Procedure is a bar to a suit for possession of land in relation to which the plaintiff had brought a previous suit under s. 42 of the Specific Relief Act for a declaration of title, which suit had been dismissed on the ground that the plaintiff was not in possession. We are not aware of any authorities in this Court. We have not been referred to any case in this Court in which it was even suggested that s. 43 of the Code of Civil Procedure was applicable to such a case. The point has been decided by the High Court at Calcutta in *Jibunti Nath Khan v. Shib Nath Chuckerbutty* (1), and, we think, rightly. In our opinion s. 43 does not apply to such a case as this. The appeal is dismissed with costs.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

MUSAHEB ZAMAN KHAN (JUDGMENT-DEBTOR) v. INAYAT-UL-LAH
(DECREE-HOLDER).*

1892
May 20.

Mortgage—Suit for sale on a Mortgage—Rights of mortgagee in respect of non-hypothecated property of the mortgagor—Resjudicata—Act IV of 1882. ss. 68, 88, 89 and 90—Civil Procedure Code, sch. IV, forms Nos. 109 and 128.

Where there is nothing to show a contrary intention of the parties, every mortgage carries with it a personal liability to pay the money

* Appeal No. 38 of 1891 under s. 10 of the Letters Patent.

(1) I. L. R. 8 Calc., 819.

1892

MUSAHER
ZAMAN KHAN
v.
INAYAT-UL-
LAH.

advanced; but a mortgagee must sue for his merely against the property first. In so doing it is immaterial whether or not he prays in his plaint for relief over against non-hypothecated property. Unless in exceptional cases he can obtain such relief only under the provisions of s. 90 of the Transfer of Property Act, and if such relief is refused the refusal will not bar a subsequent application under s. 90. *Hafiz-ud-din Ahmad v. Damodar Das* (1) approved: *Batak Nath v. Pitamber Das* (2), distinguished: *Sutton v. Sutton* (3), *Raj Singh v. Parmanand* (4), *Miller v. Digambari Debbya* (5), and *Durga Dai v. Bhagwat Prasad* (6), referred to.

Observations on the meaning and application of ss. 88, 89 and 90 of the Transfer of Property Act. Explanation of the term "legally recoverable" in s. 90. *Sonatum Shah v. Ali Nawaz Khan* (7), discussed.

THE facts of this case are as follows:—

On the 26th of January 1885, Inayat-ullah obtained a decree for sale of certain mortgaged property under a mortgage-deed, dated the 26th of August 1879. The decree was framed under s. 88 of the Transfer of Property Act (Act No. IV of 1892), and was executed under s. 89 of the same Act; but on the mortgaged property being sold it was found that the proceeds fell short of the money due under the mortgage by Rs. 428-15. On this the decree-holder at first applied to execute his decree under s. 88 against the other property of the judgment-debtor, but that application was rejected on the 21st of August 1889. The decree-holder accordingly applied for a decree under s. 90 of the Transfer of Property Act for the above-mentioned sum with interest. To this application the judgment-debtors (representatives of the original mortgagor) objected that inasmuch as the decree-holder in his plaint in the suit had asked for relief over against non-hypothecated property and that prayer had been disallowed, his claim for a decree under s. 90 was *res judicata*. They pleaded also that the decree-holder's application was barred by reason of the rejection of his previous application. Both these objections were disallowed, and a decree under s. 90 was given to the applicant. The judgment-debtors then appealed to the Subordinate Judge, relying on the objections which they had urged before the Munsif. This appeal was dismissed, and the judgment.

(1) Weekly Notes, 1889, p. 149.

(4) I. L. R., 11 All., 486.

(2) I. L. R., 13 All., 360.

(5) Weekly Notes, 1890, p. 142.

(3) 22 Ch. D., 515.

(6) I. L. R., 13 All., 566.

(7) I. L. R., 16 Cal., 423.

debtors then appealed to the High Court, pleading, in addition to the pleas taken in the lower appellate Court, that the balance claimed was not legally recoverable from them under the deed of the 26th of August 1879, and that the application was barred by limitation. This second appeal was dismissed by Knox, J., on the 30th of July 1891, and thereupon the judgment-debtors again appealed under s. 10 of the Letters Patent, on this occasion relying on an additional ground, *viz.*, that the mortgage not having provided for relief over against the non-hypothecated property of the mortgagor no such relief could be granted.

1892
MUSAHEB
ZAMANKHAN
v.
INAYAT-UL-
LAH.

Munshi Gobind Prasad, for the appellants.

Mr. Abdul Majid, for the respondent.

EDGE, C. J., and BLAIR J.—This is an appeal from a decree made under s. 90 of the Transfer of Property Act. The appeal is on behalf of the defendants to the suit. The suit was brought on a mortgage of the 26th of August 1879. The defendants are the heirs of the mortgagor. In the plaint in the suit, in addition to a decree for sale being asked for, there was a prayer for relief against non-hypothecated property. A decree for sale was made under s. 88 of the Transfer of Property Act: it was executed under s. 89 of the Transfer of Property Act, and after it had been executed it was ascertained that the nett proceeds of the sale under s. 89 were insufficient to pay the amount due for the time being on the mortgage. Upon that a decree under s. 90 was applied for. In the decree under s. 88 no relief over against non-hypothecated property was granted, and the first point taken here is that the relief over against non-hypothecated property not having been granted when the decree under s. 88 was made, s. 13 of the Code of Civil Procedure barred the mortgagee's claim for a decree under s. 90 of the Transfer of Property Act. On that point several authorities, some of them having very little to do with the question, were cited. Amongst other cases that were relied on for the appellant was the case of *Baiak Nath v. Pitambar Das* (1). That case was referred to as deciding that a Court in a suit for sale under a mortgage

1892

MUSAHER
ZAMANKHAN
v.
INAYAT-UL-
LAH.

under the Transfer of Property Act could in the first instance give a decree under s. 88 of that Act coupled with a decree for sale of non-hypothecated property. Now with regard to that case it is only necessary to observe that the decision was given, not in an appeal from the decree, but in an appeal which arose in the execution of a decree made against the hypothecated property and non-hypothecated property. The original decree which was in execution had not been appealed from and was final, and the Court executing that decree was bound to execute it according to its terms. It is consequently not an authority on this point. Another case to which we have been referred is the case of *Hafiz-ud-din Ahmad v. Damodar Das* (1). In that case Mr. Justice Straight said:—"I do not myself see how it is possible to hold that anything in the terms of the original decree passed on the mortgage can be said to make any question that could arise under s. 90 of the Transfer of Property Act as *res judicata*. Taking s. 88 and reading it in conjunction with s. 90 it is clear that there are two distinct decrees to be passed, the decree under s. 88 in the suit for sale, and the decree under s. 90 upon the application of the decree-holder in accordance with the terms of that particular section." That, in our opinion, is a perfectly correct view of the law. In *Raj Singh v. Parmanand* (2) it was held by this Court that a decree under s. 90 is a decree to be made in the original suit and not in a fresh suit. In the case of *Miller v. Digambari Debye* (3) this Court held that the plaintiff was entitled to join with his claim for enforcement of the mortgage a further claim for a declaration that if the sale proceeds should prove insufficient to discharge the debt its discharge might be enforced against the person and other property of the defendant. There is nothing to prevent the plaintiff asking for such a relief; the only question is at what period of the suit has the Court power to grant relief against non-hypothecated property. In *Durga Dai v. Bhagwant Prasad* (4) it was considered that the application for a decree under s. 90 was an application in execution, and so an application for a decree under s. 90 is in one sense an application

(1) Weekly Notes, 1889, p. 149.

(3) I. L. R., 13 All., 356.

(2) I. L. R., 11 All., 486.

(4) Weekly Notes, 1890, p. 142.

in execution, but we do not think that it can be regarded as an application in the execution of a decree made under s. 88 of the Transfer of Property Act. The time for making an application under s. 90 and for the Court making a decree under that section does not arrive until the remedies under ss. 88 and 89 have been exhausted. When the decree passed under s. 88 which is ordered to be executed under s. 89 has failed to discharge the money due at the time under the mortgage, then for the first time in the suit for sale under the Transfer of Property Act the Court has power to decree the sale of non-hypothecated property. The decree for sale under s. 88 is limited to the hypothecated property.

1892

MUSAHEB
ZAMANKHAN
v.
INAYAT-UL-
LAH.

We have been referred to forms Nos. 109 and 128 in the 4th Schedule of the Code of Civil Procedure. It is true that the form No. 109, which is a general form of plaint for a suit for sale under a mortgage, does include in its prayers for relief a prayer that if the proceeds of the sale of the mortgaged property shall not be sufficient for payment in full of the amount to be ascertained the defendant should pay to the plaintiff the amount of the deficiency. It may be inferred from that form, that it would not be improper to claim originally in the suit the subsequent relief; but when we turn to form No. 128, which is a general form of decree for sale in a mortgage suit, we find that that form is confined, so far as the present purposes are concerned, strictly to a decree under s. 88 of the Transfer of Property Act and does not include any subsequent relief. It might be inferred from these two forms that the subsequent relief, although it might be claimed in the plaint, was not to be included in the decree for sale under s. 88. In our opinion the more correct way of drawing up a decree in a suit for sale on a mortgage would be to confine the decree for sale, *i.e.*, the first decree to be passed, to a decree under s. 88 against the mortgaged property, and that any subsequent relief to which, after that decree had been executed, in might appear that the plaintiff was entitled, should stand over for a decree under s. 90. In our opinion s. 13 of the Code of Civil Procedure would not apply to an application under s. 90 for a decree, no matter whether the plaintiff had or had not claimed originally in

1892
MUSAHEB
ZAMAN KHAN
v.
INAYAT-UL-
LAH.

his suit subsequent relief, or whether, if claimed, such subsequent relief had been allowed or disallowed by the Court when making the decree under s. 88, the time for adjudicating on the claim for subsequent relief not arriving until the decree under s. 88 had been exhausted.

Another objection which was relied on for the defendants, was that the balance in respect of which the decree under s. 90 has been made was not legally recoverable from the defendants otherwise than out of the property sold. It will be remembered that the defendants are not the mortgagors, but the heirs of the mortgagor, and they are Muhammadaus, and that the property which it is sought to sell under the decree under s. 90 is property which was of the mortgagor in his lifetime and has come to the defendants as his heirs. Mr. *Abdul Majid* for the respondent, the decree-holder, has relied upon the decision of the Calcutta Court in *Sonatum Shah v Ali Newaz Khan* (1) as an authority to show that the balance legally recoverable under s. 90 from the defendants otherwise than out of the property sold is the balance remaining due to the decree-holder under the decree obtained under s. 88 of the Transfer of property Act. In our opinion, however, effect must be given to the words "legally recoverable" and "otherwise than out of the property sold," which that decision does not appear to give. These words, in our opinion, mean, by way of illustration, that the balance must be a balance which the mortgagee is not precluded by the terms of the mortgage from realizing otherwise than out of the property sold or a balance the recovery of which is not barred by limitation, e.g., the suit might have been brought at a period of time when, if the plaintiff was relying on his personal remedy against the defendant, his suit for the personal remedy would be barred by time although within time as a suit for sale on the mortgage. We do not say that this is exhaustive. We merely refer to these two cases as illustrations. Now in the mortgage here there is nothing to preclude the plaintiff from obtaining a decree under s. 90 and it has not been suggested that there is any bar of limitation, but

(1) L. L. R., 16 Cal., 423.

it is contended on behalf of the defendants that the mortgage contained no covenant or promise upon which the mortgagor or his heirs holding assets could be made liable, and that the only remedy was against the property mortgaged. If it be the fact, we do not say that it is so, that on the true construction of the mortgage there is no express covenant or provision to pay the mortgage money otherwise than out of the mortgaged property, still there is the implied promise to pay, which, if there is nothing in the mortgage from which a contrary intention should be inferred, the law will presume from the fact of the mortgagor's accepting the loan. Where there is in a mortgage nothing to the contrary the "mortgage contains within itself, so to speak, a personal liability to repay the amount advanced." [See the observations of Sir George Jessel M. R. in *Sutton v. Sutton* (1).]

1892

MUSAHEB
ZAMAN KHAN
v.
INAYAT UL-
LAH.

In support of the argument on behalf of the defendants that the balance was not legally recoverable except from the property mortgaged, it was further suggested that s. 68 of the Transfer of Property Act debarred the plaintiff from any remedy except against the mortgaged property. It is quite true that s. 68 precludes a mortgagee from suing the mortgagor for the mortgage money except in the cases provided for in that section, that is, it would preclude the mortgagee from maintaining a suit in which his primary relief was a relief against the mortgagor personally unless the case came within the exception to that section. That section in our opinion in no wise debars a mortgagee from seeking the decree provided for by s. 90. The mortgagee suing on his mortgage for sale gets a decree under s. 88, executes his decree under s. 89, and, if the nett proceeds of the sale are insufficient, then, without any suit against the mortgagor personally, the mortgagee is given in his suit on the mortgage a further remedy by way of a decree under s. 90. For these reasons we hold that our brother Knox, from whose judgment this is a Letters Patent appeal, was right in dismissing the judgment-debtor's appeal to this Court. We dismiss this appeal with costs.

Appeal dismissed.

REVISIONAL CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

1892
May 21.

RAHIMA (DEGREE-HOLDER) v. NEPAL RAI (JUDGMENT-DEBTOR).*

Act IV of 1882 s. 87 - Civil Procedure Code, ss. 2, 244 and 622—Revision.

An order under s. 87 of Act IV of 1882 extending the time for payment of the mortgage money by a mortgagor is a decree within the meaning of ss. 2 and 244 of the Code of Civil Procedure, 18*2, and therefore no application will lie under s. 622 of that Code for revision of such order.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

The Hon'ble Mr. *Spankie*, for the applicant.

Mr. *Abdul Raoof*, for the opposite party.

EDGE, C. J., and BLAIR, J.—This is an application for revision in which we are asked to exercise our powers under s. 522 of the Code of Civil Procedure, and to set aside an order of the Subordinate Judge of Gházipur postponing the day appointed for payment under a foreclosure decree. The decree was made under s. 86 of the Transfer of Property Act. A date was fixed for payment. After the expiry of that date the Subordinate Judge, on the application of the defendant, made the order which we are asked to revise. The order was not a ministerial order such as the order in the case of *Hulas Rai v. Pirthi Singh* (1), or the order in the case of *Bandhu v. Shah Muhammad Taki* (2). It was an order which was made under s. 87 of the Transfer of Property Act, and, if the Court had power to make it at all, it could only have been made upon good cause shown. Consequently, it was a judicial and not a ministerial order. In our opinion it was an order which related to the execution or discharge of a decree within the meaning of clause (c) of s. 244 of the Code of Civil Procedure. It was consequently appealable as a decree. The view is consistent with the taken by this Court in the case referred to in the note at page 502 and is not inconsistent with the case of *Hulas Rai v. Pirthi Singh*. As the

* Application for Revision No. 63 of 1891, under s. 622 of the Civil Procedure Code.

(1) I. L. B., 9 All., 500.

(2) Weekly Notes, 1888, p. 119.

order in question was appealable, it cannot be the subject of revision under s. 622 of the Code of Civil Procedure. The application for revision is dismissed with costs.

1892

RAHIMA

v.

NEPAL RAIL.

Application rejected.

EXTRAORDINARY ORIGINAL CRIMINAL.

Before Mr. Justice Knox.

QUEEN-EMPRESS v. STANTON AND FLYNN.

1892

June 7.

Practice—Sessions trial—Witness for the Crown not called at Sessions trial though examined before the committing Magistrate—Duty of the prosecution with regard to the production of such witness.

At a trial before the High Court in the exercise of its original criminal jurisdiction it is not the duty either of the prosecution or of the Court to examine any witness merely because he was examined as a witness for the Crown before the committing Magistrate, if the prosecution is of opinion that no reliance can be placed on such witness' testimony. All that the prosecution is bound to do is to have the witnesses who were examined before the committing Magistrate present at the trial so as to give the Court or Counsel for the defence, as the case may be, an opportunity of examining them. *Dhunno Kazi* (1) and *Empress of India v. Kaliprosanna Doss* (2) approved. *The Empress v. Grish Chundra Talukdar* (3) and *The Empress v. Ishan Dutt* (4) dissented from.

THIS was a trial before Knox, J., and a jury at the Criminal Sessions of the High Court. The accused, Patrick Stanton and John Flynn, were charged with offences punishable under ss. 457, 380, 411 and 414 of the Indian Penal Code. At the close of the case for the prosecution, Counsel for the defence called the attention of the Court to the fact that one of the witnesses who had been examined by the committing Magistrate had not been called by the prosecution, and contended that such witness ought to be called by the prosecution or at least tendered for cross-examination, or should be examined by the Court. The arguments on both sides are stated in the ruling of Knox, J.

The Public Prosecutor (the Hon'ble Mr. *Spankie*), for the Crown.

(1) I. L. R., 8 Calc., 121.

(2) I. L. R., 14 Calc., 245.

(3) I. L. R., 5 Calc., 614.

(4) 15 W. R., Cr. R., 34.

1892

QUEEN-
EMPRESS
v.
STANTON.

Mr. J. E. Howard, for the prisoners.

KNOX, J.—The prosecution in this case having concluded their case without calling a certain witness, one Michael Tyrrell, who had been examined by the committing Magistrate Mr. Howard, who appeared for the defence, contended that it was the duty of the prosecution at any rate to place that witness in the witness-box so that Counsel for the defence might exercise his right of cross-examination. If this was not done, he contended further that the Court in the interests of the defence and of justice, ought to send for that witness and examine him as a witness called by the Court. The learned Counsel referred the Court to the practice which, according to him, had prevailed for the first eight or nine years, if not further, from the institution of the Court, and observed that the principle for which he was arguing was a principle too well known to need the weight of authority. He was unable to refer the Court to any precedent save that of the *Empress v. Girish Chunder Talukdar* (1). That was a case tried before Jackson and Tottenham, JJ., and Mr. Justice Jackson there laid down that “the ordinary practice in properly constituted Courts is, that where a witness for the prosecution is not called on the part of the Crown, he is placed in the witness-box in order that the defence may have an opportunity of cross-examining him; and certainly where the judge thought it necessary to call one of these witnesses for the purpose of eliciting some facts which he thought material for the prosecution, the prisoner ought to have been allowed an opportunity of putting any question that he thought necessary in cross-examination.” For this view Mr. Justice Jackson has cited on authority, and, with the exception of the case of *The Empress v. Ishan Dutt* (2), I have been unable to find any criminal case ruling to the same effect. On behalf of the Crown I have been referred to the case of *The Empress of India v. Kaliprosunno Dass* (3). That was a very strong case. In it Counsel for the Crown, after putting forward such number of witnesses as he thought sufficient to support the case for the Crown, tendered a number of others for cross-examination, but refrained from

(1) I. L. R., 5 Cal., 614.

(2) 15 W. R., Cr. R., 34.

(3) I. L. R., 14 Cal., 245.

examining or tendering for cross-examination a witness of whom the Crown considered that no reliance could be placed upon his evidence. Mr. Justice Trevelyan held that under the circumstances he was of opinion that the prosecution were not bound to tender such a witness for cross-examination or to do more than have him present in Court for the accused to call him or not, as he might think fit. I was also referred to the case of *Dhunno Kazi* (1) in which the presiding Judges held that "the only legitimate object of a prosecution is to secure, not a conviction, but that justice be done. The prosecutor is not therefore free to choose how much evidence he will bring before the Court. He is bound to produce all the evidence in his favour directly bearing upon the charge. It is *prima facie* his duty, accordingly, to call those witnesses who prove their connection with the transactions in question, and also must be able to give important information. The only thing which can relieve the prosecutor from calling such witnesses is the reasonable belief that, if called, they would not speak the truth." Mr. *Spankie* contended as to the principle which should govern the decision in this case that the Code of Criminal Procedure gives ample facilities to an accused person for placing before the Court and Jury every witness from whom he considers it likely that anything to his benefit may be elicited. Looking to the way in which cases are prepared in India, I am distinctly of opinion that the principle laid down in the later Calcutta cases, in *Dhunno Kazi* and in *Kaliprosonno Doss*, is the right principle. The Code of Criminal Procedure nowhere lays upon the prosecution the burden of putting forward as a witness in support of their case any person on whose evidence they cannot place reliance. The duty of a Public Prosecutor, in India especially, is one attended with great difficulty, and he should be allowed the utmost freedom in marshalling his evidence, for in most cases he will find, so far as my experience goes, no proper attempt made to do so by the Court below. Looking to the old practice, I cannot find that any further duty was imposed on the prosecution in this country than that of having in attendance every witness who had been examined by the committing Magistrate. This the prosecution is bound to do, and

(1) I. L. R., 8 Calc., 121.

1893

QUEEN-
EMPRESS
v.
STANTON.

1892

QUEEN-
EMPERESS
v.
STANTON.

this they have done in the present instance. It might perhaps be contended that if the committing Magistrate had stated in his order of commitment that he had been influenced by a certain witness in ordering an accused person to be committed, Counsel for the Crown was in common fairness bound either to examine such witness or to tender him for cross-examination. In the present case the witness Tyrrell was a witness called especially by the Court, and, for reasons which will presently appear, I will say nothing further than this--that after examination him the committing Magistrate placed on record that his evidence was not evidence which induced him to make or led him in any way up to his order of committal. I have said this much in order that Counsel may in future cases have a guide to what I believe ought to be the practice in criminal trials in this Court. As, however, many observations have been made respecting this witness to the jury, I will under the circumstances call him under the special powers given to me under s. 540.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

IMAM-UD-DIN AND ANOTHER (DEFENDANTS) v. LILADHAR
(PLAINTIFF).*

1892

June 13.

Suit—Non-joinder of parties—Limitation—Act XV of 1877, s. 22—Civil Procedure Code, s. 33—Partnership—Right of surviving partner to sue for debts due to firm.

Except possibly in the case of an assignment by the other surviving partner or partners, it is not competent to one only of two or more surviving partners to sue for a debt due to the firm. *Dular Chand v. Balram Das* (1) and *Gobind Prasad v. Chandar Sekhar* (2) referred to.

A Court may, under s. 32 of the Code of Civil Procedure, and a party necessary to a suit, although it may be obliged by the Indian Limitation Act, 1877, to dismiss the suit after such party has been added. *Ramsebuk v. Ram Lall Koondoo* (3) and *Kalidas Keval Das v. Nathu Bhagvan* (4) referred to. *The Oriental Bank Corporation v. Charriol* (5) discussed.

*First Appeal No. 7, of 1892 from an order of W. Blennerhassett, Esq., District Judge of Aligarh, dated the 18th December 1891.

(1) I. L. R., 1 All., 453.

(3) I. L. R., 6 Cal., 815.

(2) I. L. R., 9 All., 486.

(4) I. L. R., 7 Bom., 217.

(5) I. L. R., 12 Cal., 642.

THE facts of this case sufficiently appear from the judgment of the Court.

1892

IMAM-UD-DIN

v.

LILADHAR.

Mr. *W. M. Colvin*, Babu *Jogindro Nath Chaudhri*, and Maulvi *Ghulam Muftaba*, for the appellants.

Mr. *Hameed-ullah*, for the respondent.

EDGE, C. J., and TYRRELL, J.—This appeal has arisen in a suit brought on two *hundis*. The promisees of the *hundis* were a firm called Moti Ram, Liladhar. The drawers of the *hundis* are the defendants, appellants here. The suit was originally brought by Liladhar alone. The defendants required inspection of the books of the firm Moti Ram, Liladhar, and from time to time obtained further time for filing their written statement. When they filed their written statement they distinctly raised the objection that all the parties who should necessarily be joined as plaintiffs were not joined. Upon that Jiwa Ram applied to be made a co-plaintiff. Liladhar opposed, but in the result the Subordinate Judge, exercising his powers under s. 32 of the Code of Civil Procedure, made Jiwa Ram a co-plaintiff with Liladhar. Now at the time when Jiwa Ram was made a co-plaintiff any suit on those *hundis* in which it was necessary to make him a party was barred by limitation. The Subordinate Judge found that Jiwa Ram, Liladhar and Moti Ram, who was their father, were joint owners and co-parceners in the firm of Moti Ram, Liladhar, and that on the death of Moti Ram the surviving “co-parceners,” who, on those findings were the surviving co-partners, were Liladhar and Jiwa Ram. Liladhar on his own behalf appealed against the decree of the Subordinate Judge, which had dismissed the suit on the ground of limitation. His grounds of appeal are as follows :—

- (1) The shop of Moti Ram and Liladhar is not ancestral.
- (2) The plaintiff alone is entitled to sue.
- (3) Jiwa Ram has no right of suit.
- (4) Jiwa Ram has been improperly made a plaintiff.

The District Judge on appeal allowed the appeal on the ground that “the defendants did not raise the plea of non-joinder at the

1892
IMAMU-D-DIN
v.
LILADHAR.

earliest possible period, nor before the first hearing ; consequently they must be taken to have waived it, and the suit can proceed in Liladhar's, plaintiff's name," and remanded the case under s. 562 of the Code of Civil Procedure. From that order of remand this appeal has been brought. The learned District Judge apparently confounded the right of a defendant to object on the ground of the want of parties with the power of a Judge to act under s. 32 when the fact of the want of parties is brought to his attention by the pleadings or otherwise. The objection as to want of parties was taken by the defendants in their written statement and could not well have been taken before. Section 117 of the Code of Civil Procedure shows that when a written statement has been filed, whether it has been filed at or before the first hearing of the suit, the Court, amongst other things, shall at the first hearing of the suit ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the written statement, if any, of the opposite party and are not expressly or by necessary implication denied by the party against whom they are made. The written statement is the most formal document in which a defendant can raise an objection of want of parties or that he did not make the contract as alleged. In our opinion the objection was in this case taken at the earliest possible opportunity, and the Subordinate Judge was not precluded by s. 34, and by the fact that the objection was taken at the first hearing from making his order under s. 32. Having regard to ss. 64, 68 and 69 of the Code of Civil Procedure, the first hearing of a suit might be the earliest opportunity which a defendant might have of raising any question as to want of parties. It is difficult to understand how a defendant could be deemed to have waived an objection for want of parties by not having taken the objection before the first hearing when he had no opportunity of taking his objection until the first hearing, or was until then ignorant of the facts on which the objection depended. Whether under such circumstances a defendant could be deemed to have waived the objection or not, his omission could not deprive the Court of the power to act under s. 32. Now the plaintiff, Liladhar, had taken out a certificate for the purposes of this case which

covered only one-half of the amount claimed. The explanation given for that is that he required no certificate so far as his own moiety of the firm's claim is concerned, and that a certificate was only required in respect of the share of his deceased father. This negatives the suggestion that this was not a case of partnership, but only a case of survivorship in a joint family. The meaning of the first ground in the memorandum of appeal in the Court below is not very plain. It had been found that the business or firm of Moti Ram Liladhar was a co-partnership. The second, third and fourth grounds of appeal appear to raise only questions of law on the findings of fact in the first Court. The lower appellate Court did not come to any finding of fact inconsistent with any findings of fact in the first Court. It apparently assumed that they were correct. Two questions arise. The first is, where a contract is made with or a debt incurred to a firm consisting of three partners and one of those partners dies, can a suit be maintained by one of the two surviving partners alone against the contractors or debtors? In our opinion it cannot, except possibly in the case of an assignment by one of the two surviving co-partners to the other, which is not the case here. It was decided by this Court in the case of *Dular Chand v. Balram Das* (1) that a suit cannot be maintained by one only of the partners of a firm in respect of a cause of action which had accrued to all jointly. It was decided by this Court in *Gobind Prasad v. Chandar Sekhar* (2) that the surviving partner or partners were the persons to sue on a contract made with the firm. In our opinion that is good law, and it was necessary in order that this suit should be maintainable that the surviving partners of the firm of Moti Ram, Liladhar should be plaintiffs in the suit. The next question is what is the effect of one of those surviving partners not having been made a party until after the period of limitation for such a suit had expired? In *Ramsebuk v. Ram Lall Koondoo* (3) and *Kalidas Kevaldas v. Nathu Bhagvan* (4) it was held that where an objection on the ground of non-joinder of parties was taken in proper time by the defendants, and limitation had run so far as the

1892

IMAM-UD-DIN
v.
LILADHAR.

(1) I. L. R., 1 All., 453.

(3) I. L. R., 6 Calc., 815.

(2) I. L. R., 9 All., 486.

(4) I. L. R., 7 Bom., 217.

1892
IMAM-UD-DIN
v.
LILADHAR.

persons were concerned who should have been joined as plaintiffs and had not been joined, the whole suit must be dismissed. It appears to us that the same result must follow where a Judge acting under s. 32 of the Code of Civil Procedure adds a person as a necessary plaintiff after the period of limitation for a suit by him alone or with others has expired. S. 22 of the Indian Limitation Act, 1877, would clearly apply to the right of suit of the person so added, and the suit could not be maintained without him. The only case which has been suggested as throwing any doubt on that being the correct view of the law is the case of *The Oriental Bank Corporation Charrool* (1). All that that case apparently decided was that limitation does not preclude a Court from acting under s. 32 of the Code of Civil Procedure in adding a person as a necessary party to a suit. It is not obvious how the observations of the learned Judges in that case could be reconciled with the specific provisions of s. 22 of the Indian Limitation Act, 1877, if those observations are to be read as implying that any Court could do otherwise than dismiss a suit which was barred by limitation. The power of a Court to add a party and the duty of that Court to dismiss the suit as barred by limitation are two different questions. Some of the illustrations referred to in that case appear to be cases contemplated in the provisoes to s. 22 of the Indian Limitation Act, 1877. The recent Full Bench case of *Bindeshri Naik v. Ganga Saran Sahu* (2) as to the question of limitation where a party is joined related to the joinder of a party under the provisions of s. 559 of the Code of Civil Procedure.

In our opinion the decree of the first Court was right. We set aside the order under appeal and affirm the decree of the first Court.

Appeal decreed.

(1) I. L. R., 12 Cal., 642.

(2) I. L. R. 14 All., 154.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

JAI KISHN (DEFENDANT) v. BHOLA NATH AND ANOTHER (PLAINTIFFS).*

1892

June 20.

Civil Procedure Code, s. 214—Pre-emption—Decree for pre-emption conditioned on payment within fixed time—Omission to state consequence of non-payment—Limitation.

Where in a suit for pre-emption the decree, while decreeing the plaintiff's right to pre-emption upon payment of the pre-emptive price within one month from the date of the decree, omitted to state what would be the effect on the plaintiff's suit of non-payment within the prescribed period :—*Held* that the plaintiff, unless he had paid the pre-emptive price before the expiry of the said month, could not enforce his decree for pre-emption. *Kodai Singh v. Jaisri Singh* (1) referred to. *Bandhu Bhagat v. Shah Muhammad Taqi* (2) dissented from.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Madho Prasad*, for the appellant.

Pandit *Bishambar Nath*, for the respondents.

EDGE, C. J., and TYRRELL, J.—This was a suit to redeem a mortgage. The plaintiffs were assignees of the mortgagor. The defendant set up a defence that the mortgage no longer existed, as he had become, in pursuance of a decree of the Court, the purchaser in pre-emption, pre-emption having arisen on the sale of the equity of redemption. Jai Kishn is the defendant. On the 20th of May 1887, he got his decree in pre-emption in the Court of the Subordinate Judge subject to his paying the pre-emptive price within one month from the date of the decree. He appealed to the District Judge. The District Judge in appeal varied the decree so far as the price was concerned and fixed one month from the date of his decree for payment. The District Judge did not go on to declare that if the money and costs were not paid within the month, the suit should stand dismissed with costs, and therefore technically his

* First Appeal No. 32 of 1892 from an order of M. S. Howell, Esq., District Judge of Sháhjahánpur, dated the 7th December 1891.

(1) I. L. R., 13 All., 376.

(2) Weekly Notes, 1892, p. 40.

1892

JAI KISHN

v.

BHOLA
NATH.

decree was not in complete accordance with s. 214 of the Code of Civil Procedure ; but it is quite clear from that decree that Jai Kishn's pre-emptive right could only be enforced under the decree if he made the payment within the month, and that if he failed to make the payment within the month the decree which he had obtained was unless to him, as he is right was decreed to be dependent on the payment within the month. Jai Kishn appealed to this Court, and this Court dismissed his appeal and confirmed the decree of the District Judge. When this Court made its decree it did not extend the time for payment of the pre-emptive price. Most probably the Court was not asked to do so. The pre-emptive price was not paid into Court until long after the expiration of the month limited by the decree of the District Judge. Now in this suit Jai Kishn, the defendant, is relying on that decree in his pre-emption suit. The first Court in this suit accepting his contention dismissed the suit. The second Court set aside the decree and passed an order of remand under s. 562 of the Code of Civil Procedure. Jai Kishn had brought this appeal from that order of remand. Mr. *Madho Prasad* has contended that, as the decree of the District Judge in the pre-emption suit, although it fixed one month from the date of the decree for payment of the money and costs, did not declare that if the money and costs were not paid within the month the suit should stand dismissed, the defendant had three years limitation from the date of that decree or from the date of the decree in appeal in this Court to pay in the money. He relied on the case of *Bandhu Bhagat v. Shah Muhammad Taqi* (1), in which it was held that where a decree under s. 92 of the Transfer of Property Act did not declare what was to take place if the redemption money was not paid within the period fixed by the decree the mortgagor had three years limitation for the execution of his decree, notwithstanding that he had not paid the money within the time fixed by the decree. Any judgment of the Judge who decided that case is entitled to careful consideration and great weight, but it appears to us that s. 92 of the Transfer of Property Act fixes the outside period of limitation within which a Court may fix a day for the payment of the

(1) Weekly Notes, 1892 p. 40.

money, and that outside limit is 6 months and not 3 years. The section also enacts what the decree shall be. Section 93 shows what may take place according to law if the money is paid or is not paid within the period limited by the decree under s. 92. When a decree under the Transfer of Property Act fixes a time within 6 months for the payment of the money, we fail to see how a plaintiff, unless he could get extension of the time, could have a right to make the payment after the time limited had expired. In the case of *Kodri Singh v. Jaisri Singh* (1) three of the Judges concurred in the decision of Mr. Justice Straight, which was not inconsistent with the view which we hold in this case, and two of those three Judges expressly protected themselves from being understood as expressing any opinion on the cases referred to by Mr. Justice Mahmood in his judgment. In our opinion Jai Kishn, not having made the payment within the time limited by the decree, lost the benefits of that pre-emption decree and cannot protect himself under it. The decree of the Judge of Shahjahanpur was right. We dismiss this appeal with costs.

1892
JAI KISHN
v.
BHOLA
NATH.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

FATIMA BIBI (PLAINTIFF) v. ABDUL MAJID (DEFENDANT).*

1892
July 22.

Act X of 1877, ss. 45, and 212, 244, clause (a) — Suit for recovery of immoveable property and for mesne profits — Separate trials of the two claims — Transfer of suit by order of High Court, duty of Court to which the transfer is made.

When a suit has been transferred by an order of the High Court from the Court of a Subordinate Judge to the Court of the District Judge for trial, it is the duty of the District Judge to try the suit himself, and he is not competent to transfer the suit back to the Court of the Subordinate Judge.

In a suit on title in which the recovery of immoveable property and mesne profits are claimed the Court may, under s. 45 of the Code of Civil Procedure, order separate trials in respect of the claim for the recovery of the immoveable property and in respect of the claim for mesne profits.

Where under s. 212 of the Code of Civil Procedure a Court in such suit passes a decree for the property and directs an inquiry into the amount of

* First Appeal No. 218 of 1891, from a decree of Babu Nil Madhub Rai, Subordinate Judge of Jaunpur, dated the 2nd June 1890.

(1) I. L. R., 13 All., 376.

1892 *mesne* profits the direction as to the inquiry into the amount of *mesne* profits need not necessary be contained in the decree. *Puran Chand v. Roy*
 FATIMA BIBI *Radha Kishen* (1) referred to.

v.
 ABDUL
 MAJID. THE facts of this case are fully stated in the judgment of the Court.

Messrs. *T. Conlan, Amir-ud-din, A. Strachey* and *Abdul Raoof* and *Babu Jogindro Nath Chaudhry*, for the appellant.

The Hon'ble Mr. *Sparkie*, Mr. *D. Banerji*, *Munshi Jwala Prasad* and *Pandit Sundar Lal*, for the respondent.

EDGE, C. J., and BLAIR, J.—In order to understand the question which we have got to deal with here it is necessary shortly to refer to the proceedings in the suit. The suit was brought by a Muhammadan lady against her nephew for a declaration of title to, and for possession of, certain shares in immoveable property. The plaintiff also claimed *mesne* profits for the years 1283, 1284 and 1285 *Fasli*. It would appear that the question as to her title to be awarded *mesne* profits in case her title to the shares was established was not disputed. The defendant, in fact, paid into Court some Rs. 15,000 in respect of the claim for *mesne* profits. It would also appear that in order to ascertain what the *mesne* profits were for the years in question to which the plaintiff would be entitled a troublesome and prolonged inquiry would be necessary. We should say that the plaintiff's claim for *mesne* profits amounted to some 99,000 odd rupees. The suit was instituted in the Court of the Subordinate Judge of Jaunpur on the 5th of May 1879, and on the 3rd of October 1879 the Subordinate Judge passed an order that the case should be brought forward for determination of the claim to the property, and that it be separately brought forward for inquiry into and determination of the claim for *mesne* profits. That order undoubtedly meant that there should be, so to speak, two separate inquiries and determinations in the same suit, *viz.*, that the question of title to the property should be first determined, and that after that was determined the question of *mesne* profits should be disposed of. Previously to that order, namely, on the 26th of June 1879, the Subordinate Judge had fixed nine issues for determination in the

suit. The first seven issues did not relate to the question of *mesne* profits, but related to the question of title to the property and the kind of possession, if any, to which the plaintiff was entitled. The eighth issue related to the amount of *mesne* profits; the ninth issue was as to costs. On the 18th of June 1880 the Subordinate Judge not having gone into question of *mesne* profits made a decree as to title and possession. The decree itself was silent as to the question of *mesne* profits, but the earlier part of the judgment on which the decree was based shows why the question of *mesne* profits had been allowed to stand over, and although that judgment deals with the other issues, it says, as to the eighth and ninth issues:—"The last two issues cannot now be decided and must be left to my successor to decided." There can be, consequently, no suggestion that the question of *mesne* profits had been tried or determined, or that it can be inferred from the decree being silent as to them that the plaintiff's claim to *mesne* profits had been rejected by the Subordinate Judge. The defendant appealed to this Court from that decree, and this Court on the 6th of January 1882 dismissed that appeal. In the judgment dismissing the appeal the learned Judges, in referring to *mesne* profits, said:—"As to the *mesne* profits, interest thereon and costs relating thereto, we have for the present nothing to do." From that decree in this Court the defendant appealed to her Majesty in Council, and his appeal was on the 27th June 1885 dismissed. On the 25th of February 1882, the then Subordinate Judge of Jaunpur framed and fixed certain issues relating to the question of *mesne* profits. On the 15th of March 1882 the defendant applied to the Subordinate Judge to have further issues fixed, and on the 21st of March 1882 the Subordinate Judge made an order fixing certain additional issues. For reasons which may or may not have been good the trial of the question of *mesne* profits was removed from the Court of the Subordinate Judge to the Court of the District Judge. Then, after the then Subordinate Judge had been replaced by his successor, the trial as to *mesne* profits was sent back to the Court of the Subordinate Judge. It was then ultimately sent back to the Court of the District Judge. The last mentioned order was

1892

FATIMA BIBI

v.

ABDUL
MAJID.

1892
FATIMA BIKH
v.
ABDUL
MAJID.
o

made on the 3rd of February 1885. On the 24th of February 1886, the then District Judge of Jaunpur, having absolutely no jurisdiction to transfer the case from the Court, passed an order transferring it to the Court of the Subordinate Judge. The case was then under the orders of this Court, which was the only Court having jurisdiction to make an order of transfer in the case, in the Court of the District Judge, and it was the duty of the District Judge to obey the law and the orders of this Court, and himself to dispose of the case which had been transferred by this Court to his. Up to that time there had been endless delays. The plaintiff had been anxious to get her *mesne* profits determined. There appears to have been an equal anxiety on the part of the defendant to hinder and delay the determination of the question of *mesne* profits. The file and record in the case under the order of the District Judge of the 24th of February 1886 went back to the Court of the Subordinate Judge of Jaunpur, and the then incumbent of that office on the 2nd of June 1890 having heard apparently argument at some length from learned counsel, held in his judgment of that date that the order of the District Judge was *ultra vires*, that the Court of the Subordinate Judge had no jurisdiction, and that, if it had, as the plaintiff declined to adopt the suggestion of the District Judge that it was necessary to bring the decree into accordance with the judgment, the only course for the Subordinate Judge was to strike the case off his file. He accordingly passed a decree or order striking the case off the file and ordering one-quarter costs to be allowed to the defendant. That order is dated apparently the 17th of June 1890. That is an incorrect date. It should have borne the same date as the judgment. From that decree or order this appeal has been brought. That decree or order was, at any rate, a determination by the Subordinate Judge that the question as to *mesne* profits could not be decided in his Court, and consequently, so far as his Court was concerned, it, subject to appeal, concluded that question. The plaintiff had from time to time made attempts, sometimes in the Court below and twice in this Court, to get the question of the *mesne* profits to which she was entitled determined. Notwithstanding orders of this Court the question has still remained

undetermined. The defendant apparently has succeeded, by raising difficulties and making applications, in keeping the plaintiff out of what she is in justice entitled to, namely, a determination of the amount of *mesne* profits to which she is entitled, and consequently, if the plaintiff is entitled to a larger sum for *mesne* profits than the Rs. 15,000 paid into Court, the defendant has successfully kept her down to the present moment out of possession of such *mesne* profits. Such delays amount to an abuse of the process of the Civil Courts. It is the duty of Civil Courts to facilitate the determination of questions such as these here, and by their decrees and orders to put the successful litigant promptly in possession of what he proves himself to be entitled to. It would almost appear as if in the Courts at Jaunpur during the period when this lady was trying to obtain her rights a powerful and obstructive defendant was able to defeat justice. Some of the judicial officers who had to do with this case undoubtedly tried to do their duty, and no blame is to be attached to them. It is now contended on behalf of the plaintiff, appellant here, that the District Judge of Jaunpur had no jurisdiction to make the order of the 24th of February 1886. That is also admitted by the able Counsel who represents the defendant. We are satisfied that the District Judge had no jurisdiction to make the order of transfer, and that what the Subordinate Judge should have done was to have returned the record to the Court of the District Judge and not to have passed a decree or order awarding costs in the case. It has been contended on behalf of the respondent that the plaintiff is now debarred of all right to have the question of *mesne* profits determined. That contention is based upon a suggested construction of s. 212 of the then Code of Civil Procedure. It is argued that the latter part of s. 212 applies only to enable the Court to include in its decree for possession in a direction that *mesne* profits should be ascertained, and that the decree itself not containing such direction, the question of *mesne* profits cannot now be raised, unless by bringing the decree into accordance with the judgment. The object of the contention, which was the contention before the District Judge of Jaunpur in 1886, is obvious. If the plaintiff did apply to bring the decree into accordance with the judgment, the

1882

FATIMA BIBI

v.

ABDUL
MAJID.

1892
FATIMA BIBI
v.
ABDUL
MAJID

defendant would raise the question as to whether an application for that purpose was not time-barred, and there would thus be another opportunity afforded of prolonging the period for which the plaintiff is to be deprived of her right to have the *mesne* profits determined. Now s. 212 does not say that the direction for an inquiry into the amount of *mesne* profits shall be entered in the decree; but Mr. *Spankie* contends that s. 212 is controlled and governed by s. 244 of the Code, and that cl. (a) of s. 244 indicates that the direction to ascertain the *mesne* profits under s. 212 must be entered in the decree. We cannot interpret s. 212 by s. 244. If we were to do so it would be necessary in all cases in which a direction for inquiry into *mesne* profits was made under s. 212 that the execution of the decree should remain in the Court which passed the decree, because it is the Court which under s. 212 directs an inquiry which has "to dispose of the same" on further orders, and consequently the powers, and very necessary powers, of transferring a decree for execution elsewhere contained in the Code would be inapplicable to a case coming within the latter portion of s. 212 if the contention were correct. In our opinion cl. (a) of s. 244 only applies to a case in which a decree deals specially with *mesne* profits, i.e., decrees the period for which *mesne* profits are to be allowed, and the property in respect of which they are to be allowed, and does not apply to the ordinary case where a decree is passed for the property and an inquiry as to the amount of *mesne* profits is directed under s. 212. The Subordinate Judge who made the decree obviously thought that he was acting under s. 212 of the then Code of Civil Procedure. In our opinion he had power to act as he did under s. 212 of the then Code, and we are also of opinion that he had power under s. 45 to try separately the questions of title and of *mesne* profits. We are rather inclined to the opinion that, although he thought he was acting under s. 212, his procedure came within s. 45 and was justified by that section. Mr. *Spankie* addressed to us a long argument on the meaning of the words "cause of action" in s. 45. It appears to us that the term "cause of action" has not been used in ss. 43, 44, 45, 46 and 47 of the then Code in precisely the same sense. Section 44 shows that the Legislature considered

that the cause of action for *mesne* profits of immoveable property was distinguishable from the cause of action for the recovery of immoveable property. A full Bench of the High Court of Calcutta in the case of *Puran Chand v. Roy Radha Kishen* (1) held that a decree which was for the possession of immoveable property and which referred to the *mesne* profits as follows :—"The amount of *mesne* profit shall be ascertained in the execution department,"—was not a decree for those *mesne* profits, and that, so far as it referred to the *mesne* profits, it was merely an interlocutory order, and that he proceedings to determine the amount of the *mesne* profits were not in that case proceedings in execution of the decree, but were merely a continuation of the original suit and carried on as if a single suit were brought for *mesne* profits by itself. In that case the period for which the *mesne* profits were to be awarded was not ascertained or fixed by the decree. That judgment is consistent with our view as to the meaning of cl. (a) of s. 244 of the Code. It is clear that this lady is in justice entitled to have the *mesne* profits ascertained in order that she may obtain payment of those *mesne* profits, if she succeeds in showing that they amount to more than the sum which has been paid into Court. We set aside the decree or order of the Subordinate Judge with full costs here and below to be paid by the defendant to the plaintiff, and we direct the Subordinate Judge of Jaunpur to send the file from his Court to the Court of the District Judge, in which Court alone the case properly is, there to be disposed of by the District Judge in due course of law.

NOTE.—The provisions of ss. 45, 212 and 244 of Act No. X of 1877 are identical with those of ss. 45, 212 and 244 of the present Code of Civil Procedure (Act No. XIV of 1832).

Appeal decreed.

(1) I. L. R., 19 Cal., 132.

GENERAL INDEX OF CASES REPORTED IN THIS VOLUME.

Page.

ACCUSED PERSON, EXAMINATION. *See* Criminal Procedure Code s. 342.

ACTS 1859—VIII (CIVIL PROCEDURE CODE), s. 271. *Mortgage—Suit for sale by mortgagee against auction-purchaser, mortgagee having accepted part of the proceeds of former sale—Estoppel.*] On the 10th of February 1872, one S. R. mortgaged to the plaintiff an undefined one-biswa share out of three biswas owned by him. On the 20th of March 1877. J. P. and G. P. brought to sale in execution of money decrees against S. R. two out of those three biswas, which two biswas were purchased by the defendant. The sale was confirmed on the 23rd of April 1877). Out of the proceeds of that sale Rs. 1,464-14-9 were appropriated by the plaintiff in part satisfaction of his mortgage. On the 16th of April 1877 the plaintiff sued the auction-purchaser for sale of one biswa in satisfaction of his mortgage. *Held* that even if it could be shown (which it could not) that the particular biswa mortgaged to the plaintiff was one of those which had passed into the defendant's possession, the plaintiff was estopped by his previous conduct from suing bring to it to sale under his mortgage.

Jhinka v. Baldeo Sahsi 509

—1860—XLV (INDIAN PENAL CODE), s. 193. *See* Criminal Procedure Code, ss. 195, 476 and 487.

—, ss. 299, 300, 307, 511. *Attempt to commit murder—Facts necessary to constitute such attempt*] Section 511 of the Indian Penal Code does not apply to attempts to commit murder, which are fully and exclusively provided for by s 307 of the said Act.

A person is criminally responsible for an attempt to commit murder when, with the intention or knowledge requisite to its commission, he has done the last proximate act necessary to constitute the completed offence, and when the completion of the offence is only prevented by some cause independent of his volition.

Queen Empress v. Niddha... .. 38

—, ss. 361, 366. *See* Jury.

—1868—I (GENERAL CLAUSES ACT). *See* Immoveable property.

—1873—X (OATHS ACT), s. 11. *See* Adjustment of suit.

—XIX, ss. 113 AND 114. *Partition, application for—Order on objection as to title raised in course of partition proceedings—"Order or decision"—Appeal.*] A Collector or Assistant Collector trying a question of title raised in the course of the hearing of an application for partition under the N.-W. P. and Land Revenue Act (No. XIX of 1873) is not bound to cause a formal decree to be drawn up embodying the result of his order or decision on such point. An appeal will lie from the "order" or "decision" of such Collector or Assistant Collector.

Niaz Begam v. Abdul Karim Khan 500

ACTS—1873—XIX (NORTH-WESTERN PROVINCES LAND REVENUE ACT), ss. 146, 148, 150—160, 173. *Co-sharers—Payment of arrears of Government revenue by one co-sharer, effect of—Charge—Lien—Act XII of 1881 (North-Western Provinces. Rent Act) ss. 93, 171 et seq. Act IV of 1882 (Transfer of Property Act), s.100.* A co-sharer in a mahal, who was also the lambardar, paid arrears of Government revenue for the years 1882, 1883, and part of 1884 in respect of certain lands in the mahal which were the exclusive property of another co-sharer. These lands were subject to simple mortgages executed in 1873, upon which decrees were obtained in 1884, and had been sold in execution of these decrees in 1887. The co-sharer-lambardar having obtained a decree in a Court of Revenue against the mortgagors under s. 93 (g) of the N.-W. P. Rent. Act (XII of 1881) for recovery of the arrears of revenue paid by him, sought to execute that decree under s. 177 of the Act by sale of the lands which had been sold in 1887; and thereupon the auction-purchaser at that sale objected under s. 178, and the objection having been overruled, brought a suit as authorised by s. 181 in a Civil Court to establish his title to the lands, and to have them protected from sale in execution of the Court of Revenue decree. This suit was decreed, and the decree, not having been appealed against, became final. Subsequently the co-sharer lambardar brought a suit in the Civil Court in which he claimed a decree for enforcement of lien by sale of the land for the amount of the Court of Revenue decree, and for a declaration that the said lien "which is on account of Government." be declared preferential to the mortgages of 1873, the decrees thereon of 1884, and the sales under those decrees of 1887. He claimed this lien not only in respect of the arrears of Government revenue paid, but also in respect of future interest

Held by the Full Bench (Mahmood, J, dissenting) :—

(i) That the Legislature had not given or recognized in the North-Western Provinces any such right of charge or lien in favour of a person paying Government revenue as was claimed here, or provided any means by which such a charge could be enforced, and that any such charge would be at variance with the policy and intention of the Government, as disclosed in its legislative enactments.

(ii) That no Civil Court had jurisdiction to entertain the suit, and no Court of Revenue had jurisdiction to make a decree for sale of the immoveable property or a decree in execution of which the immoveable property could be sold, to the prejudice of encumbrances to which it was subject

(iii) That it was not the intention of the Legislature that a Civil Court should have jurisdiction to invest, by declaration or otherwise, a decree of a Court of Revenue with the attributes of a decree for sale such as could be passed by a Civil Court in a suit for sale under the Transfer of Property Act, 1882.

(iv) That there is no general principle of equity to the effect that whoever, having an interest in an estate, makes a payment in order to save the estate, obtains a charge on the estate, and, therefore, in the absence of a statutory enactment, a co-sharer who paid the whole revenue and thus saved the estate, does not, by reason of such payment, acquire a charge on the share of his defaulting co-sharer. *Kianu Ram Das v. Mozuffer Hosain Shaha*, approved.

(v) That the principle of Maritime Civil Salvage had no application to the case, and that no analogy could exist between the case of a salvor in Maritime Civil Salvage and the case of a co-sharer in a mahal to whom

ACTS—1877—XV, SCH. II, ARTS. 66, 116. See Mortgage.

—————, s. 28. See suit for possession of immoveable property.

—————, SCH. II, ARTS. 95 AND 96. *Joint Hindu family Partition to detriment of minor. Suit by minor on attaining majority to recover his full share—Limitation.*] Certain members of a joint Hindu family partitioned the family property among them in such a way as to give one member of the family, who at the time of the partition was a minor, less than the share to which he was entitled. The minor was represented in the partition by his uncle, though the uncle was not the natural guardian of the minor, nor in any other way entitled to deal with the minor's property. The minor on attaining majority brought a suit for recovery of the full share to which he was entitled.

Held that this was not a suit for relief on the ground of fraud or mistake, inasmuch as the partition could not under the circumstances affect in any way the rights of the minor. The suit was therefore not subject to the limitation of three years prescribed by Arts. 95 and 96 of the second schedule of Act No. XV of 1877.

Lal Bahadur Singh v. Sispal Singh ... 498

————— (INDIAN LIMITATION ACT), SCH. II, ART. 120—*Regulation No. XVII of 1806, ss. 7 and 8. Mortgage by conditional Sale—Foreclosure—Pre-emption, suit for—Limitation.*] Where a mortgage by conditional sale had been duly foreclosed in accordance with the procedure laid down in ss. 7 and 8 of Regulation XVII of 1806 and at the expiration of the year of grace a portion of the mortgage money remained unpaid: *Held* in a suit for pre-emption of the mortgaged property that the title of the conditional vendee became absolute on the expiration of the year of grace, and that the plaintiffs' right of pre-emption accrued and limitation began to run against him from the expiration of such year of grace. *Forbes v. Ameroonissa Begam* distinguished; *Raisuddin Chowdhry v. Khodu Nawaz Chowdhry*; *Jaikaran Rai v. Ganga Dhari Rai*; *Monshee Syud Ameer Ali v. Bhabo Soonduree Debba*; *Mohunt Ajoodhyn Pooroo v. Sohun Lal*; *Jeorakhun Singh v. Hookum Singh*; *Buddree Loss v. Durga Pershad*; *Mussamat Tara Kunwar v. Mengri Mees*; *Hazari Ram v. Shankar Diol*; *Tawakkul Rai v. Lachman Rai* and *Ajaib Nath v. Mathura Prasad* referred to. *Prag Chawbey v. Bhajan Chaudhri*; *Rasik Lal v. Gajraj Singh* and *Udit Singh v. Padarath Singh* overruled.

Ali Abbas v. Kalka Prasad ... 406

—————, ART. 141. *Suit by daughter entitled to possession of immoveable property on death of Hindu widow.*] The daughter of a separated Hindu, who was entitled to succeed to her father's immoveable property upon his widow's death, instituted, after the widow's death, a suit for possession of such property against certain persons who, upon the Hindu's death, had obtained possession and held it adversely to the widow.

Held by the Full Bench that Art. 141 of sch. II of the Limitation Act (XV of 1877) was applicable, and that limitation ran from the date of the widow's death, *Srinath Kur v. Prasunno Kumar Ghose* followed.

Ram Kali v. Kedar Nath ... 156

—————, SCH. II, ART. 184. See Mortgage.

he prays in his plaint for relief over against non-hypothecated property. Unless in exceptional cases he can obtain such relief only under the provisions of s. 10 of the Transfer of Property Act, and if such relief is refused, the refusal will not bar a subsequent application under s. 90. *Hafiz-ud-din Ahmed v. Damodar Das*, approved; *Balak Nath v. Pitambar Das*, distinguished; *Sutton v. Sutton*; *Raj Singh v. Parmanand*; *Miller v. Digambari Dehya* and *Durga Dai v. Bhagwat Prasad*, referred to.

Observations on the meaning and application of ss. 88, 89 and 90 of the Transfer of Property Act. Explanation of the term "legally recoverable" in s. 50. *Senatun Shah v. Ali Nawaz Khan*, discussed.

Musahab Zaman Khan v. Inayat-ul-la ... 613

ACTS—1882—IV (TRANSFER OF PROPERTY ACT) s. 87. *Civil Procedure Code*, ss. 2 244, and 622—*Revision*.] An order under s. 87 of Act IV of 1882 extending the time for payment of the mortgag' money by a mortgagor is a decree within the meaning of s. 2 and 244 of the Code of Civil Procedure, 1882, and therefore no application will lie under s. 622 of that Code for revision of such order.

Rahima c. Nepal Rai ... 520

of 1873, ss. 146, 148, 150-168, 171. s. 100. See Act XIX

—V (INDIAN EASEMENTS ACT). See Easement.

—1886—XIV, s. 5. See Acts—1881—XII, s. 189.

—1887—IX (SMALL CAUSE COURTS ACT), SCH. II, CL. (6). See Immoveable property.

CL. (18)—*Revision*
—*Powers of High Court—Jurisdiction*.] Unless the facts from which want of jurisdiction on the part of a subordinate Court may be inferred are patent upon the face of the record, the High Court will not interfere in revision.

A suit by a Muhammadan to obtain a share in property distributable under the terms of a certain endowment is a suit of the nature contemplated by clause 18 of schedule II of the Provincial Small Cause Courts Act (IX of 1887), and therefore not cognizable by a Court of Small Causes.

Mahir Ali Shah v. Muhammad Hosen ... 413

—1890—VIII (GUARDIANS AND WARDS ACT, 1890), s. 10. *Guardian and ward—Guardian ad litem—How long appointment of guardian remains in force—Change of guardian on application of ward*.] Where a guardian *ad litem* has once been appointed, his appointment endures for the whole of the *lis* in the course of which it has been made, unless and until it is revoked by the Court; but if the person to whom such guardian is appointed prays for his removal and for the substitution of a guardian named by the applicant, the Court will appoint the guardian so named in absence of any special and valid objection to such person.

Jwala Dai c. Pirbhu ... 35

—1891—VIII. See Easement.

ATTEMPT TO COMMIT MURDER. See Act—1860—XLV, ss. 399, 300, 307, 511.

BAI-BIL WAFI, NATURE OF. See Pre-emption. (1)

BENGAL REGULATIONS, 1806, No. XVII, ss. 7 AND 8. See Act XV of 1877, sch. ii, Art. 120.

BOHRA BRAHMAN. See Hindu law. (1)

BURDEN OF PROOF. See Hindu law. (2)

—————. See suit for possession of immoveable property.

CHARGE. See Act XIX of 1873 ss. 146, 148, 150-166, 173.

CIVIL AND REVENUE COURTS—*Jurisdiction—Landholder and tenant—Occupancy tenant—Suit by landholder against successor of occupancy tenant for arrears of rent which accrued during the lifetime of his predecessors—Act XII of 1881 (North-Western Provinces Rent Act), ss. 9, 93, cl. (a), 112A, 161.* An occupancy tenant in possession, who has accepted the occupancy holding, is liable to be sued for arrears of rent not barred by limitation which accrued in the lifetime of the person from whom the right of occupancy has devolved upon him.

The suit above referred to is exclusively cognizable by a Court of Revenue.

So held by the Full Bench, Mahmood, J., *dissentiente*.

The following cases were referred to:—By Edge, C.J.:—*Jyeparkush v. Sheenpurshad*; *Mata Deen Doobey v. Chundee Deen Doobey*; *Mata Deen v. Chundee Deen*; *Wazir Muhammad v. Amaunt Khan*; *Bhikhan Khan v. Ratan Kuar* and *Ahmad-ud-din Khan v. Majlis Rai*. By Knox, J.:—*Ashootosh Chuckerbutty v. Bancomadhub Mookerjee*; *Benod Behary Mookhopadhyay v. Beer Narain Roy* and *Hossein Ali Beg v. Ashraff Ali Beg*. By Mahmood J.: *Gopal Pandey v. Parsotam Das*; *Mahadeo Singh v. Bachu Singh*; *Wazir Ali v. Muhammad Ismail* and *Ahmad ud-din Khan v. Majlis Rai*.

Lekbraj Singh v. Rai Singh ...

381

CIVIL PROCEDURE CODE. See Immoveable property.

—————, ss. 2, 244 AND 623. See Act IV of 1882, s. 87.

—————, ss. 2, 540, 588. See s. 293 and s. 295.

—————, s. 13, ExPL. II. *Res judicata—Execution of decree—Principle of res judicata as applied to execution proceedings.*

Where a person on his own application was added as a party respondent to an appeal, and on the case in appeal being remanded under s. 562 of the Code of Civil Procedure for retrial on the merits, practically took no steps whatever to defend the suit—*Held* that he could not afterwards plead, by way of objection to execution of the decree, matters which ought to have formed part of his defence to the suit, had he chosen to defend it. *Ram Kirpal v. Rup Kuari*, referred to.

Kishan Sahai v. Aladad Khan ...

64

—————, ss. 13, 278, 331. See Execution of decree.

execution" of a decree to make good the loss happening on a re-sale occasioned by his default. *Ram Dayal v. Ram Das*, and *Rajinath Sahai v. Moharaj Narain Singh*, dissented from. *Sundagar Mal v. Abdul Rahman Khan*, *Rahim Bakhsh v. Dhuri*, followed.

So held by EDGE, C.J., MAHMOOD and KNOX, J.J.; STRAIGHT, J., dissenting.

Deoki Nandan Rai v. Tapasri Lal 201

CIVIL PROCEDURE CODE, s. 295. *Order dismissing application for participation in assets—Civil Procedure Code, ss. 2, 244—Appeal.*] No appeal will lie from an order under s. 295 of the Code of Civil Procedure dismissing, on the ground that the decree was barred by limitation, a decree-holder's application to share in the assets realized under another decree against the same judgment-debtor. Such an order cannot be regarded as a decree under s. 244 read with s. 2 of the said Code.

Kashi Ram v. Mani Ram 210

—, ss. 350, 359. *Procedure in case of dishonest applicant—Powers of Court.*] A Court is competent to take action under s. 359 of the Civil Procedure Code at the instance of a creditor, after the hearing under s. 350 has determined.

(*Per STRAIGHT, J.*—It is desirable that an application under s. 359 should be made immediately, or as soon as possible, after the hearing under s. 350, but a delay of some months will not make the application unentertainable.)

When once any of the frauds referred to in clause (a), (b), or (c) of s. 359 have been proved at a hearing under s. 350, the Court must under s. 359 either itself pass sentence on the applicant who has committed such frauds, or must send him to a Magistrate to be dealt with according to law. The Court has no option to decline to adopt either of these courses.

In acting under s. 359, the Court does not retry the questions of fact decided by it at the hearing under s. 350, but has to proceed upon the findings come to at that hearing. An applicant for a declaration of insolvency who does not avail himself of his right of appeal from the order rejecting his application, is concluded by the findings of fact at the hearing under s. 350, and cannot afterwards question them.

Kadir Bakhsh v. Bhawani Prasad 145

—, ss. 351 et seq. *Execution of decree—Insolvency—Two reliefs not concurrent.*] A decree-holder in respect of whose judgment-debtor an order declaring him insolvent and appointing a receiver has been passed under s. 361 of the Code of Civil Procedure, and whose decree has been placed on the list of the judgment-debtor's scheduled debts, cannot, *pari passu* with the proceedings in insolvency, go on executing his decree in the ordinary way against that judgment-debtor. *Badal Singh v. Birch* and *Abdul Rahman v. Behari Puri*, distinguished.

Gauri Datt v. Sankar Lal 368

—, s. 375. *See Adjustment of suit.*

—, s. 514. *Arbitration—Power of Court to extend time for making award.*] A Court has power to act under s. 514.

had taken place materially affecting the decree of the High Court, which dismissed the suit of the sister's son on return made under section 667.

Chandi Din v Naini Kuar ... 366

CIVIL PROCEDURE CODE, s. 577. *Unverified sulahnamah.*] Where an application purporting to contain the terms of a compromise was presented to the High Court by one of the parties to an appeal before it, but on the so-called *sulahnamah* being sent down to the lower Court for verification, it was found that the attendance of the parties for that purpose could not be procured—*Held* that the High Court was not justified in passing a decree under s. 577 of the Code of Civil Procedure in accordance with the terms of the unverified *sulahnamah*.

Baudhu Bhagat v. Shah Muhammad Taqi ... 350

_____, Sec. IV. FORMS NOS. 109 AND 128. *See* Mortgage.

CONDITIONAL SALE. *See* Pre-emption.

CONSTRUCTION OF DOCUMENT. *See* Pre-emption.

CONSTRUCTION OF STATUTES. *Reference to Objects and Reasons and to Report of Select Committee.*] In construing a statute, the Court cannot refer to the statement of Objects and Reasons attached to a Bill, or to the report of a Select Committee, or to the debates of the Legislature, but can only look to the statute itself. *Queen-Empress v. Kartick Chunder Das and Kamesh Chunder Sunnyal v. Hiru Mandal*, dissented from on this point.

Kadir Baksh v. Bhawani Prasad ... 145

CO-SHARER. *See* Act XIX of 1873, ss. 146, 148, 150-166, 171.

CRIMINAL PROCEDURE CODE, s. 55. *Subsequent treatment of persons arrested under the provisions of s. 55.*] Where a person is arrested by the police under the provisions of s. 55 of the Code of Criminal Procedure he should always be given the option of release on reasonable bail being supplied.

In the matter of the petition of Daulat Singh ... 45

_____, s. 107. *Security to keep the peace—Power of the Magistrate of a district to call upon a person residing in another district to furnish security.*] Section 107 of the Criminal Procedure Code does not empower a Magistrate to issue process under it to a person not residing within his jurisdiction.

In the matter of the petition of Jai Prakash Lal, followed. *Rajendra Chunder Roy Chowdhry and Dinomath Mullick*, approved.

In the matter of the petition of Abdul Aziz ... 49

_____, s. 192. *Transfer—Procedure to be followed where a case has been transferred after the evidence for the prosecution has been recorded.*] A Magistrate to whose Court a case under s. 385 of the Indian Penal Code had been transferred at a stage when all the evidence for the prosecution had been taken, did not resubmit the witnesses for the prosecution but proceeded to act on their evidence as if it had been taken before himself—*Held* that whether such procedure amounted to an irregularity or illegality or not, it was sufficiently prejudicial to the accused to warrant the conviction being quashed.

Queen-Empress v. Bashir Khan ... 346

Held that although, as a matter of order, such a question would be better raised either when the first document intended to be used in this way was put to a witness, or when the accused was asked if he meant to adduce evidence, yet there was nothing in the Code of Criminal Procedure to prevent the Court from deciding the question at any other stage, and that, under the special circumstances of the case, it might be considered then.

Held also that the use of the documents in the manner aboves tated gave the prosecution a right of reply. *Queen-Empress v. Grees Chunder Banerji, Empress of India v. Kaliprosanno Doss, Queen-Empress v. Solomon, and Queen-Empress v. Krishnaji Bahurao Bulell*, dissented from.

Queen-Empress v. G. W. Hayfield 212

CRIMINAL PROCEDURE CODE, s. 337. *Pardon—Trial of person who having accepted a pardon has not fulfilled the conditions on which it was offered.*] Where a pardon has been tendered to any person in connection with an offence, he should not be tried for any alleged breach of the conditions of his pardon or for any offence connected with that for which he has received pardon until the trial of the principal offence, and of any offence connected therewith, has been completed.

Queen Empress v. Sudra 316

....., s. 342. *Sessions trial—Accused person, examination of*] Questions put by the Court to an accused person under the provisions of s. 342 of the Code of Criminal Procedure, 1882, must be strictly limited to the purpose described in that section, i.e., "of enabling the accused to explain any circumstances appearing in the evidence against him." The evidence referred to in that section is the evidence already given at the trial at the time when the Court puts questions to the accused.

....., ss. 366, 367. *Judgment—Sentence.*] A sentence which has been passed or a direction that an accused be set at liberty which has been given at a Sessions trial before the judgment required by s. 337 of the Code of Criminal Procedure, 1882, has been written, is illegal.

....., s. 540. *Order of examination of witnesses.*] It is not intended by s. 540 of the Code of Criminal Procedure, 1882, that a Judge shall reserve the order of a Sessions trial and call the witnesses summoned for the defence before the case for the prosecution is closed.

Queen-Empress v. Hargobind Singh 342

CROSS-DECREES. *See* Civil Procedure Code, s. 246.

CUSTOM. *See* Hindu law. (1)

DECREE, AMENDMENT OF. *See* Letters Patent, North-Western Provinces, s. 10.

EASEMENT. *Way—Prescription—Landholder and tenant—Act V of 1892 (Easements Act)—Act VIII of 1891.*] There is nothing in Act VIII of 1891 to compel the Court to apply the Easements Act (V of 1882) to a suit commenced before Act VIII of 1891 came into force.

to act under s. 33, and that his order must be taken to have been made, as it purported to have been made, under s. 278. *Buhal Singh Chowdhry v. Behari Lal*, referred to

Mahabir Prasad v. Parmas 417

EXECUTION OF DECREE. See Civil Procedure Code, s. 293 and s. 295.

See Hindu Law (4) and (5).

GUARDIAN *ad litem*. See Act—1890—VIII, s. 10.

—AND WARD. See Acts—1890—VIII, s. 10.

HINDU LAW. (1) *Custom—Adoption of sister's son—Bohra Brahmins.*]

Amongst the Bohra Brahmins of the northern districts of the North-Western Provinces there exists a valid and legal custom, in virtue of which a person of that caste can adopt his sister's son.

Chain Sukh Ram v. Parbati 53

See Adoption.

(2) *Hindu widow—Burden of proving necessity where a Hindu widow attempts to alienate property held by her for her widow's estate.*] In order to sustain an alienation of the property held by a Hindu widow for her widow's estate, it must be shown either that there was legal necessity for the alienation, or at least that the grantee was led, on reasonable ground, to believe that there was.

In a suit upon a mortgage of such property executed under the authority of a widow borrowing money, the point whether the loan was necessary was expressed in the issues in the form of a question how far the defendants' objections, grounded on the absence of necessity, were tenable. This was obviously an incorrect mode of trying the suit, because it assumed that it was for the defendants to show absence of necessity, and did not accord with the obligation upon a mortgagee claiming under a widow, to prove a valid mortgage. It was sufficient to defeat the suit that, upon the whole case, there had been no proof of the lender's having fulfilled the legal obligation to inquire and satisfy himself that the widow, from whom he was taking a charge upon her husband's inheritance, had a proper justification for so charging it. *Hunooman Persaud v. Munraj Koonwara*, referred to.

Amarnath Sah v. Achan Kuar 420

(3) *Hindu widow Gift.*] The widow of a separated Hindu being in possession as such widow of property left by her husband executed a deed of gift of such property in favour of her daughter's son, her daughter being also a party to the deed. Subsequently to the execution of this deed of gift, the executant's daughter gave birth to another son—*Held* that the deed in question could not affect more than the life interests of the executant and her daughter, and could not operate to prevent the succession (as to a moiety of the property) opening up in favour of the subsequently-born son on the death of the survivor of the two ladies. *Ramphal Rai v. Tula Kuari*, referred to.

Duli Singh v. Sundar Singh 7

(4) *Joint Hindu family—Hypothecation by father of joint ancestral estate—Property described as "hag hagu zamindari apna"—Decree enforcing hypothecation—Attachment of estate—Suit by*

schedule of the Small Cause Courts Act (Act IX of 1887), and of the Civil Procedure Code. *Madappa v. Yenkata*, approved

Cheda Lal v. Mulchand ... 30

INJUNCTION OR ORDER STAYING A SUIT. *See* Act XV of 1877, s. 15.

INSOLVENCY. *Procedure in case of dishonest applicant. See* Civil Procedure Code, ss 350, 359.

—————. *See* Civil Procedure Code, ss 351 *et seq.*

—————. *See* Civil Procedure Code, ss. 351 *et seq.*

JOINT HINDU FAMILY. *See* Act XV of 1877, sch. ii, Arts. 95 and 96.

—————MORTGAGE. *See* Mortgage (2).

JUDGMENT. *See* Criminal Procedure Code, ss. 363, 367.

JURISDICTION. *Dismissal of suit by Munsif on preliminary point—Remand by Subordinate Judge on appeal—Fresh appeal before second Subordinate Judge, who disagrees with the finding of the former Subordinate Judge.* Where there are two Subordinate Judges in the same place, one of such Judges is not competent to overrule the decision of the other. The Court is one, though there are separate presiding officers. *Suraj Din v. Chatter* and *Ram Kirpal v. Rup Kuari*, referred to.

Kharag Prasad Bhagat v. Durdhari Rai ... 348

—————. *See* Act IX of 1887, sch. ii, cl. (18).

JURY, *misdirection of*—*What amounts to misdirection—Act XLV of 1860, ss. 361, 366*] In a trial with a jury under s. 366 of the Indian Penal Code, the Judge on the question of intent charged the jury in the following words:—"It remains only to consider the question of intent. The charge was that the girl was kidnapped in order that she might be forced or seduced to illicit intercourse. As to this, it is sufficient to say that no other inference is possible under the circumstances. When a man carries off a young girl at night from her father's house the presumption is that he did so with the intent indicated above. It would be open to him, if he had admitted the kidnapping, to prove that he had some other object, but no other object is apparent on the face of the facts."

Held, that this amounted to a misdirection of the jury. The question of intent was a pure question of fact, but the way in which it had been put to the jury, left them no option but to adopt the view taken by the Judge.

Queen-Empress v. Hughes ... 25

LANDHOLDER AND TENANT. *See* Civil and Revenue Courts.

—————. *See* Easement.

—————. *See* Limitation.

LEASE, *See* Use and occupation.

LESSOR AND LESSEE. *See* Estoppel, equitable.

LETTERS PATENT, NORTH-WESTERN PROVINCES. *Order of a single Judge of the High Court amending an appellate decree—Appeal from such order—Civil Procedure Code, ss. 406, 582, 588, 591.* Whether an order made by a single Judge of the High Court directing the amendment of a decree passed in appeal by a Division Bench of

To such a bond Art. 68 of sch. ii of the Limitation Act (XV of 1877) is applicable; but where the instrument is registered, Art. 116 may be applied to a suit for failure to pay the bond debt.

The Collector of Etawah v. Beti Maharani ... 162

MORTGAGE. Suit for sale by mortgagee against auction-purchaser, mortgagee having accepted part of the proceeds of the former sale. See Act VIII of 1859, s. 271.

———— **BY CONDITIONAL SALE.** See Act XV of 1877, sch. ii, Art. 120.

———— **EQUITABLE.** See Act IV of 1882 (Transfer of Property Act), s. 59.

———— (2) *Joint Mortgage—Redemption of the whole by one co-mortgagor—Rights of redeeming co-mortgagor as against the others—Limitation—Act XV of 1877, sch. ii, Art. 148.* Where one of several co mortgagors redeems the whole mortgage, he thereby puts himself into the position of the mortgagee as regards that portion of the mortgaged property which represents the interests of the other co mortgagors, and the period of limitation applicable to a suit for redemption brought by the other co-mortgagors is that provided for by Art. 148 of sch. ii of the Limitation Act (XV of 1877). Such period begins to run from the date when the original mortgage was redeemable and not from the date of its redemption by the aforesaid co-mortgagor. *Nura Bibi v. Jagat Narain and Raghubir Sahai v. Bungad Ali*, followed: *Umr-un-nissa v. Muhammad Yar Khan*, distinguished: *Ram Singh v. Baldeo Singh*, referred to.

Ashfaq Ahmad v. Wazir Ali ... 1

———— **REDEMPTION OF.** See Act XV of 1877 (Indian Limitation Act), sch. ii, Art. 179.

———— See Pre-emption (1).

MUHAMMADAN LAW. (1) *Shia sect—Waqf.* According to the law applicable to the *Shia* sect. of Muhammadans a *waqf-bil wasiyat*, or testamentary *waqf*, is not valid unless actual delivery of possession of the appropriated property is made by the *waqif* (or appropriator) himself to the *mutawalli* (or superintendent appointed by the *waqif*).

According to the same law the death of the *waqif* before actual delivery of possession of the appropriated property by him to the *mutawalli* or the beneficiaries of the trust, renders the *waqf* null and void *ab initio*.

Consequently, where the *waqf* dies, as mentioned above, before actual delivery of possession of the appropriated property, the consent of his heirs to the testamentary *waqf* cannot validate such *waqf*.

Distinction between *waqf-bil-wasiyat* and *wasiyat-bil-waqf* explained.

Agha Ali Khan v. Altaf Hasan Khan ... 429

———— (2) *Waqf waqf-nama containing provision for descendants of the grantor.* The fact that the grant or of a *waqf* has in the deed constituting the same made some provision for the

conditions necessary in such cases and must be set aside. *Ashgar Ali v. Delvooa Banoo Begum, Mahomed Rukhs, Kham v. Hosseini Bibi, Behari Lal v. Habiba Bibi and Kaniz Fatima v. Abbas Ali*, referred to.

Mariam Bibi v. Sakina 8

PARDON. See Criminal Procedure Code, s. 337

———. Withdrawal of—Trial of person whose pardon has been withdrawn. See Criminal Procedure Code, ss. 238, 334, 338, 339, 537.

PARTITION. Appeal from "order" or "decision" of a Revenue Officer on question of title arising in course of—See Act XIX of 1873, ss. 113 and 114.

PARTNERSHIP. See Nonjoinder of parties.

PRACTICE. (1) *Rules of Court of the 30th November 1889—Memorandum of appeal—Appeal described as "first appeal from order" instead of first appeal from decree.*] It is not a fatal objection to an appeal that the same is described in the memorandum as "First appeal from order" being in reality a first appeal from a decree, it not being shown that the respondent was in any way prejudiced by such misdescription or that by reason thereof an insufficient stamp was placed on the memorandum. *Kedar Nath v. Lalji Sahai*, quoad this point distinguished.

———. (2) *Sessions trial—Witness for Crown not called at Sessions trial, though examined before the committing Magistrate—Duty of the prosecution with regard to the production of such witness.*] At a trial before the High Court in the exercise of its original criminal jurisdiction, it is not the duty either of the prosecution or of the Court to examine any witness merely because he was examined as a witness for the Crown before the committing Magistrate; if the prosecution is of opinion that no reliance can be placed on such witness' testimony. All that the prosecution is bound to do is to have the witnesses who were examined before the committing Magistrate present at the trial, so as to give the Court or Counsel for the defence, as the case may be, an opportunity of examining them. *Dhunoo Kazi and Empress of India v. Kaliprosunno Doss*, approved; *the Empress v. Grish Chunder, Talukdar*, and *the Empress v. Ishan Dutt*, dissented from.

Queen-Empress v. Stanton 521

———. (3) *Witness for Crown tendered at Sessions trial who had not been examined by committing Magistrate.*] At a trial before the High Court or the Court of Session, the Crown cannot demand as of right that any witness who was not examined by the committing Magistrate either before commitment or, under s. 219 of the Code, after it, should be called and examined. The Court may call and examine such a witness if it considers it necessary in the interests of justice.

Queen-Empress v. G. W. Hayfield 212

RE-EMPTION. (1) *Construction of document—Mortgage—Sale—Bai bil-wafa, nature of—Act IV of 1882 s. 58.*] The transaction known to Muhammadan law as a *bai bil-wafa* is a mortgage within the meaning of s. 58 of Act IV of 1882, and not a sale.

SECURITY TO KEEP THE PEACE. *See* Criminal Procedure Code, s. 107.

SEPARATE OFFENCES. Effect of trial of in same proceeding. *See* Criminal Procedure Code, ss. 283, 284, 338, 339, and 637.

SENTENCE. *See* Criminal Procedure Code, ss. 386, 367.

SESSIONS JUDGE *Jurisdictions*. *See* Criminal Procedure Code, ss. 196, 476, and 487.

———— TRIAL. Production of Crown witnesses. *See* Practice.

————. *See* Criminal Procedure Code, ss. 258, 292 and Practice.

————. *Sessions Judge*. *See* Criminal Procedure Code, ss. 196, 476, and 487.

SET-OFF. *See* Civil Procedure Code, s. 246.

SHIAS *See* Muhammadan law (1).

STANDING CROPS. *See* Immoveable property.

SUIT FOR DECLARATION OF TITLE AND FOR POSSESSION. Subsequent suit for possession. *See* Civil Procedure Code, s. 43.

———— POSSESSIO OF IMMOVEABLE PROPERTY *Limitation—Adverse possession—Burden of proof—Act XV of 1877 (Limitation Act), s. 28.* Where a suit for the recovery of possession of immoveable property is resisted by a plea of adverse possession for more than twelve years, the question of limitation becomes a question of title, and it lies upon the plaintiff in the first instance to give satisfactory *prima facie* evidence of his possession within twelve years of the suit. *Mohima Chunder Moozoomdar v. Mohesh Chunder Neoghi and Parmanand Mier v. Sahib Ali* referred to.

Jafar Husain v. Mashaq Ali

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193

SUIT. For recovery of immoveable property and for mesne profits. *See* Act X of 1877, ss. 45, 212 and 244, cl. (a).

———— FOR RENT. *See* Use and occupation.

TRANSFER OF CRIMINAL CASE. *See* Criminal Procedure Code, ss. 192.

———— OF SUIT BY HIGH COURT. *See* Act X of 1877, s. 45, 212, and 244, cl. (a).

USE AND OCCUPATION. *Lease—Assignment by Official Liquidator of lease held by a Company in liquidation—Assignment not in writing registered.* In the course of the winding up of a Company, the official liquidator, with the sanction of the Court, sold the remainder of a lease for a long term of years reserving a rent, which was held by the company. No written assignment was ever executed, but the official liquidator handed over the lease to the purchaser, who entered into possession. In a suit by the lessors against the purchaser for rent. *Held* that whether the assignment was invalid because not in writing and registered, or whether it fell within s. 2(d) of the Transfer